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No. 86-989

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

BENJAMIN WARD, in his official capacity as Police Commissioner of the City of New York, **EDWARD I. KOCH**, in his official capacity as Mayor of the City of New York, and **THE NEW YORK CITY POLICE DEPARTMENT**,

Petitioners,

—against—

MICHAEL J. OLIVIERI, et al.,

Respondents.

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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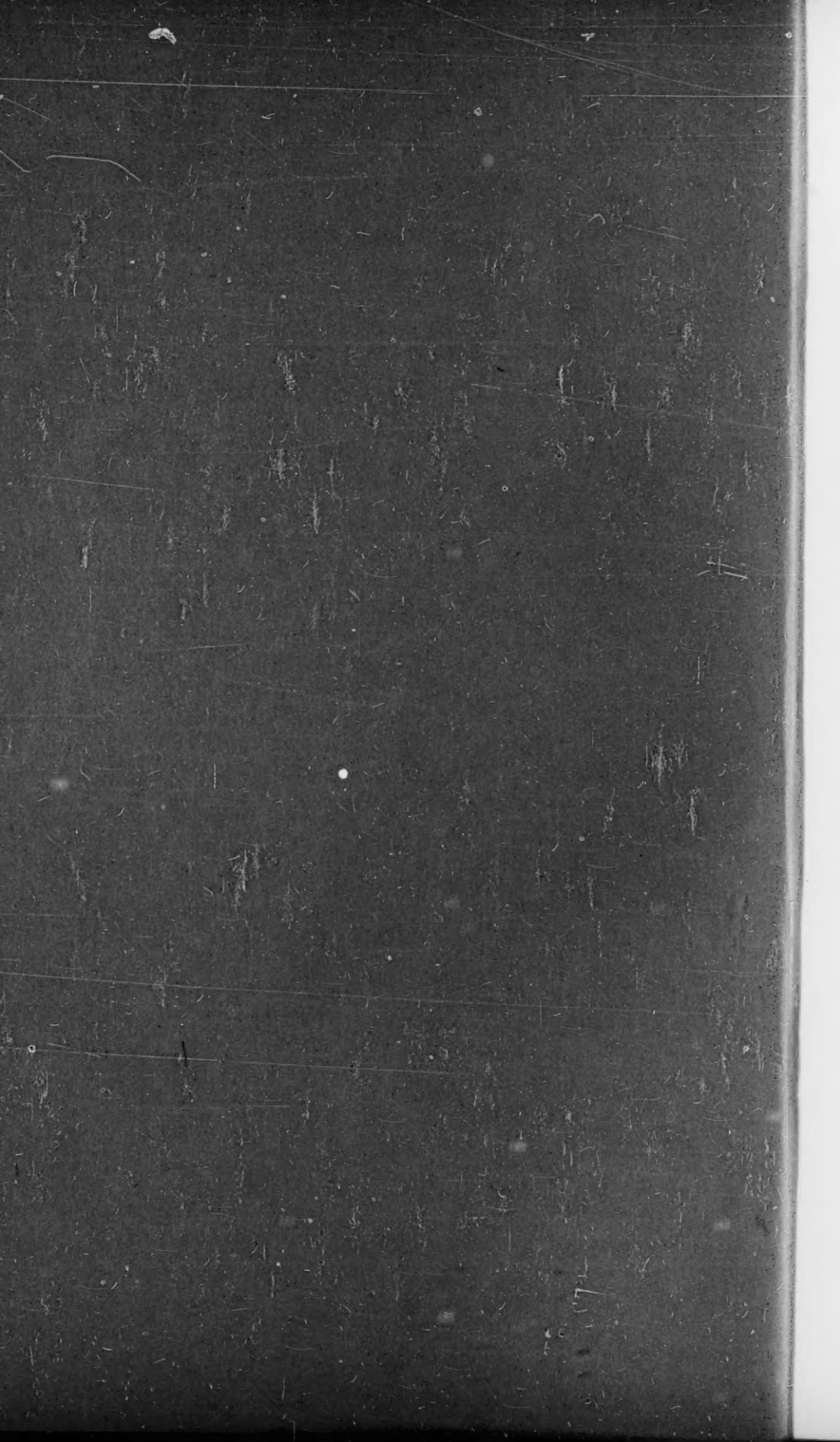
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January 30, 1987

67 (14)



**COUNTERSTATEMENT OF QUESTIONS
PRESENTED FOR REVIEW**

1. Did the courts below err in enjoining police restrictions on Respondents' symbolic speech, where they found that such restrictions were the result of content-based discrimination?

(a) Where the only justification offered by the police in prohibiting Respondents' symbolic speech was the objections of hostile onlookers, did such police action enforce a content-based "heckler's veto"?

(b) Alternatively, was the district court clearly erroneous in finding that police officers were motivated by subjective sympathy with the Catholic Church, and not by a legitimate concern for public safety, when they denied Respondents permission to engage in symbolic speech?



2. Even assuming that the police had not engaged in content-based regulation of speech, did the district court err in finding that the police restriction imposed was not a narrowly tailored time, place or manner regulation?

(a) Must the courts always defer to a police officer's determination on the necessity of restrictions on speech in order to lessen an alleged potential for violence?

(b) Was the district court clearly erroneous in finding, based on seven days of trial testimony, that claims by police officers of a danger of violence were not credible, or even if they were credible, were not rational (particularly in view of available police resources to control any potential for violence)?



PARTIES TO THE PROCEEDING

Petitioners

Benjamin Ward
Edward I. Koch
The New York City Police Department

Respondents */

| | |
|---------------------|----------------|
| Michael J. Olivieri | David Lawlor |
| J. Matthew Foreman | Jim Cannon |
| Michael Dillinger | James Doyle |
| Richard Ferrara | Ned Lynam |
| Edmund W. Trust | Edward Byrne |
| Hugh R. Bruce | Michael Conley |
| John D. Edwards | Edward Harbur |
| Joseph Brown | Robert J. Buel |
| Julius J. Spohn | Christopher |
| Bernard L. Tansey | Wesolowski |
| Clint Winant | Gary W. Spokes |

and

Dignity—New York, a not-for-profit corporation organized under the laws of the State of New York.

*/ Tom Kohler, who was originally an individual plaintiff in the district court, has since died.



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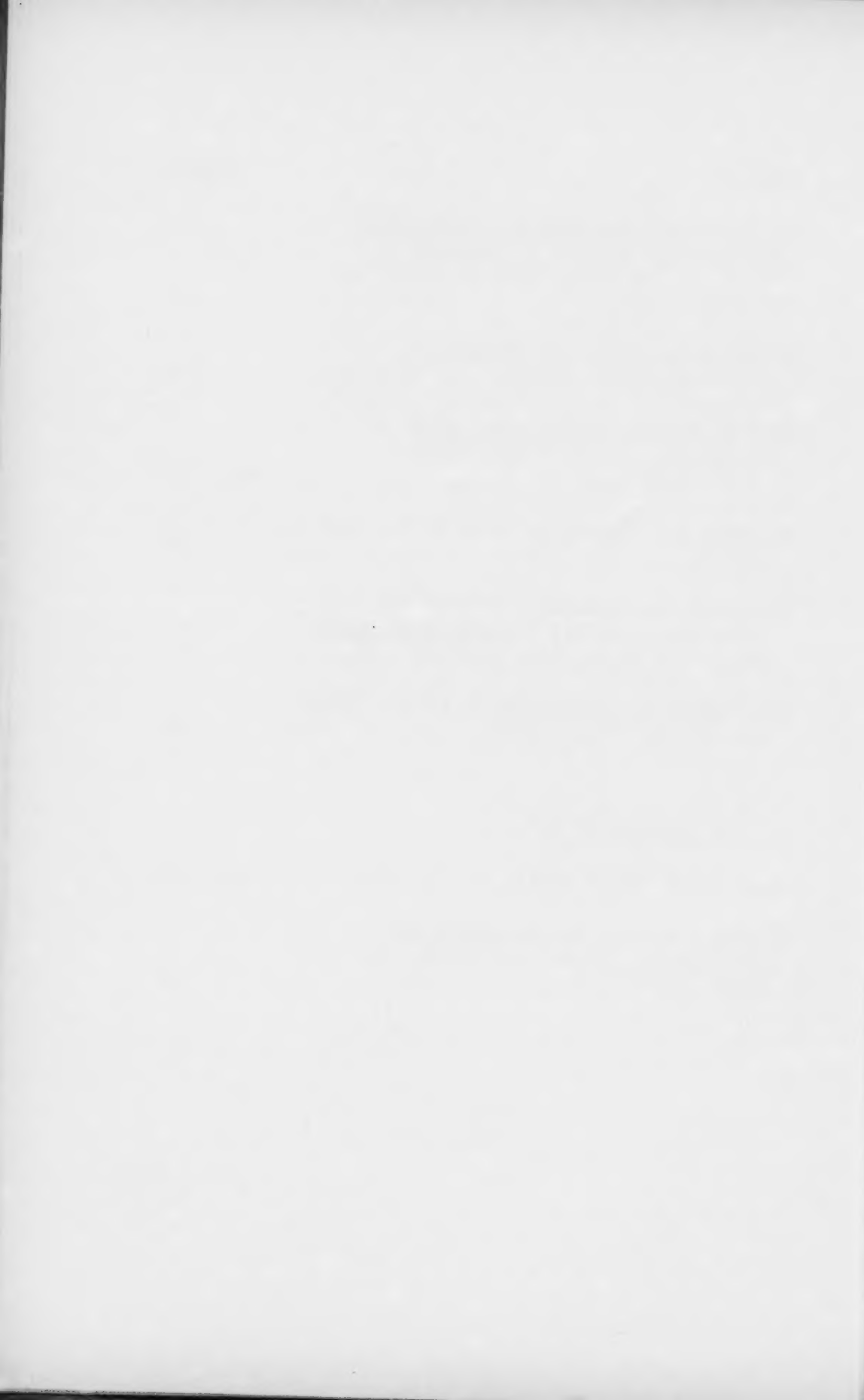
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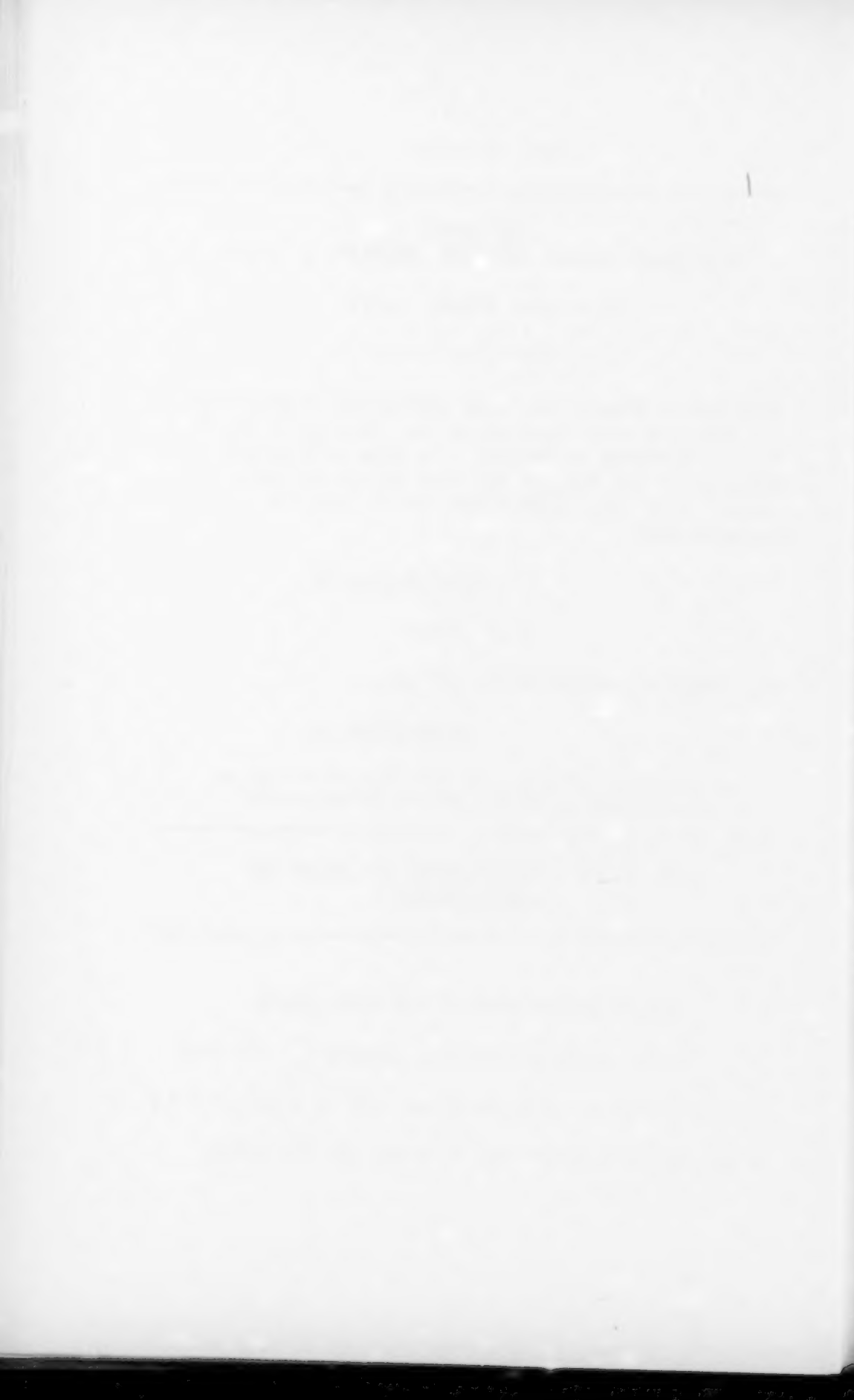
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF
CERTIORARI

COUNTERSTATEMENT OF THE CASE

This case presents unusual, if not
unique facts, concerning (1) a request by
a group conceded by all to be utterly



peaceful to demonstrate on a public sidewalk, and (2) the police response to that request, which response was found by the district court to be at best irrational, and at worst a covert attempt to suppress the viewpoint of the Respondents.

Applying this Court's well-established tests for assessing government restrictions on speech, the courts below found that the police had violated Respondents' free speech rights, based in part on a finding that the restrictions imposed by the Police Department were a result of its sympathy for the desires of the Catholic Church and certain anti-gay elements to keep Respondents off the public sidewalk in front of St. Patrick's Cathedral. In the face of an extensive factual record and findings detailing the Police Department's objective and subjective culpability on this occasion, Petitioners nevertheless ask that this Court grant certiorari



and use this case as a vehicle to announce a virtual abdication by the judiciary of any role in evaluating the constitutionality of police restrictions on speech. Particularly given the unusual facts present here, such a premise does not merit the plenary attention of this Court. 1/

A. The Speech at Issue

Dignity—New York is the local chapter of a national association of gay and lesbian Roman Catholics who seek to enjoy full communion with their Church, regardless of their sexual orientation. Its membership includes lay members, and

1/ References to "Petitioners' Appendix to Petition for Writ of Certiorari" are cited as "A__". Unless otherwise indicated, references in the Appendix are to the Findings of Fact and Conclusions of Law of the district court dated June 16, 1986. References to the opinion of the Court of Appeals are cited as "CA2 Op.: A__".

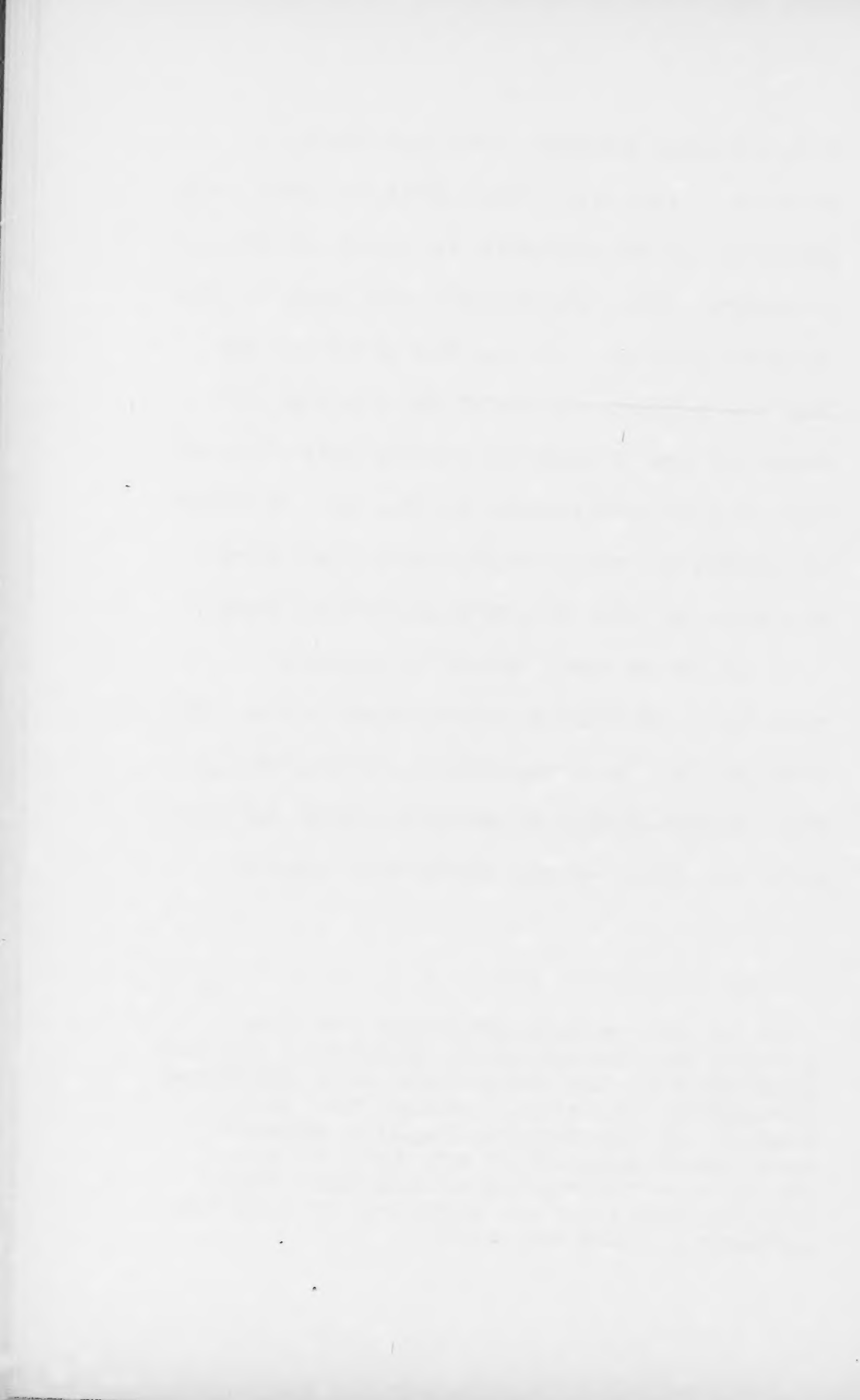
current and former priests, seminarians and religious brothers. (A39) The First Amendment controversy in this action arose in connection with the "Gay Pride Parade" (hereafter referred to as the "Parade"), which has occurred annually in New York City on the last Sunday in June for the past seventeen years. The Parade takes place pursuant to a permit issued by the Police Department, which superficially treats it just as any of the other major annual parades that take place in New York City each year. It gives expression to the social, political, and religious views of the gay community in New York, and is comprised of many different gay organizations in the region. Dignity participates as one such component. (A45-46)

Since 1976, the Parade has passed St. Patrick's Cathedral, the cathedral church of the Roman Catholic Archdiocese of New York, located on the east side of

Fifth Avenue between 50th and 51st Streets. (A45-46) From 1976 to 1982, the publicly owned sidewalk in front of the Cathedral (the "Sidewalk") was open to the general public. It was the practice of Dignity members to stand as a group in front of the Cathedral during this time as the rest of the Parade passed by, in order to symbolize their contention that they are part of the Church's spiritual body.

While on the Sidewalk, Dignity members conducted prayers, sang hymns, and engaged in other peaceful activities. 2/ More importantly, Dignity's visual presence in front of the Cathedral itself

2/ Dignity's demonstration was completely and consistently peaceful, and was permitted by the police who were stationed throughout the area. During the entire history of the Parade, Dignity members have never engaged in any form of violence, and the police acknowledge that Dignity would not do anything to harm the Cathedral. (A48-49, A100)



conveyed the very essence of their message—that they sought and were entitled to full membership in the Church, notwithstanding their sexual preference and the public opposition of the Church's hierarchy. (A47-48) Indeed, as indicated further below, the specific words used or signs displayed by Dignity are of only secondary importance to the symbolism of Dignity's presence on the Sidewalk.

Dignity's intended audience were other participants in the Parade as they passed by the Cathedral, as well as spectators, and particularly included disaffected Catholics and other gay sympathizers who might feel antipathy toward Catholicism due to the public positions of the Church hierarchy regarding homosexuality. As the district court noted, some Parade participants were openly hostile to the Catholic Church. (A49-50) It was therefore crucial to



Dignity's message to be visible not only to spectators, but to other marchers in the Parade as they passed the Cathedral. 3/ As will be seen, it was the powerful symbolic message inherent in Dignity's presence in front of the Cathedral as the Parade passed by that motivated the actions of certain anti-gay groups, the Archdiocese of New York, and ultimately the New York City Police Department.

B. The Police Response

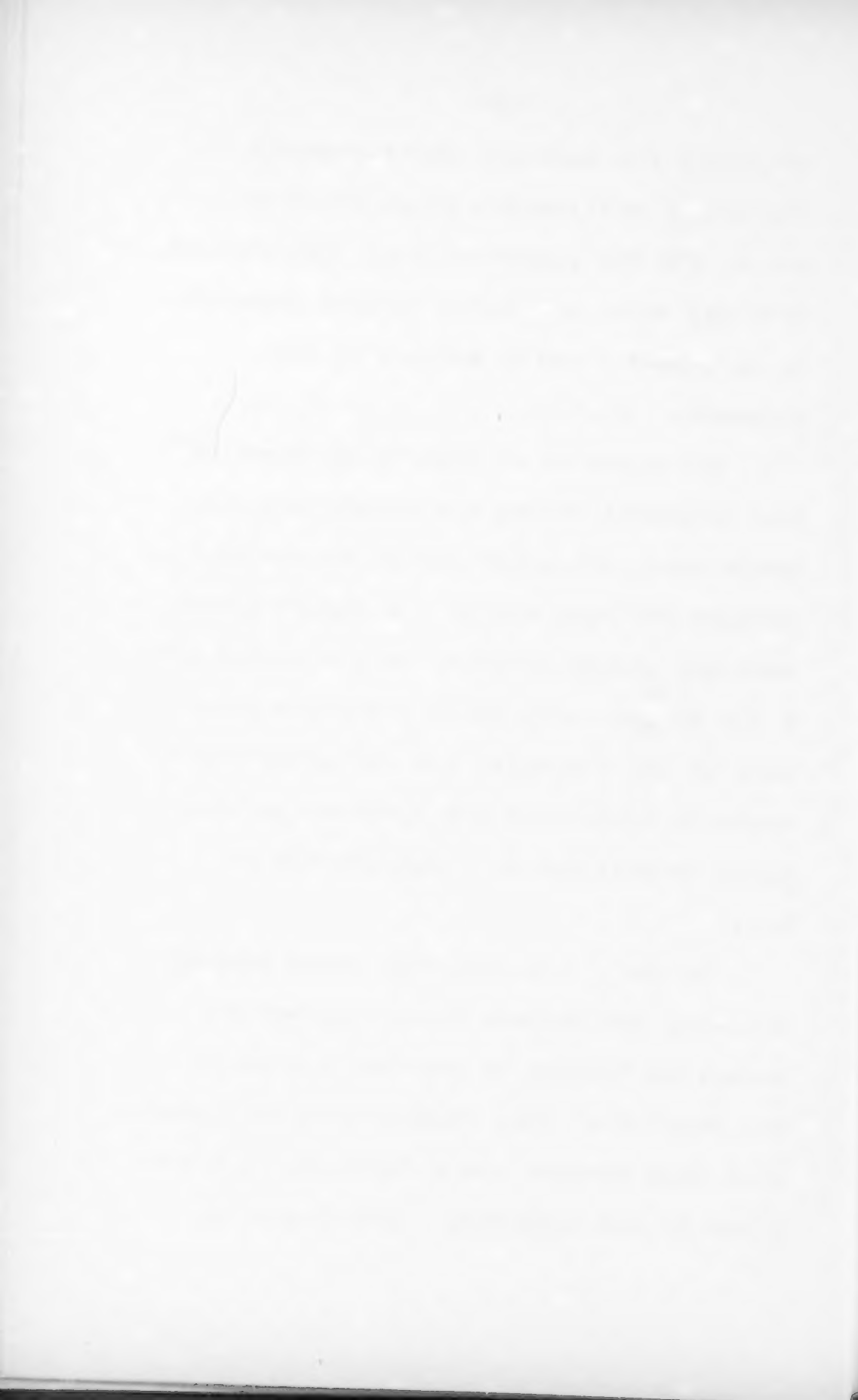
Beginning in 1983, the Police Department refused to allow Dignity access to the area in front of the Cathedral,

3/ The record indicates that Dignity's symbolic presence in front of the Cathedral had its desired effect. Not only did Parade participants applaud Dignity as they passed, but anti-Catholic expressions in front of the Cathedral were curtailed out of respect for Dignity. (See A49; Joint Statement of Agreed Facts dated August 20, 1986, ¶¶ 10, 11(a))

including the publicly owned Sidewalk. The sole justification given for this action was the purported fear that various anti-gay onlookers would attempt physically to attack Dignity members on the Sidewalk. (A84)

The presence of Dignity in front of the Cathedral during the Parade had, in years past, attracted the attention of various anti-gay groups. Although these anti-gay groups objected to the entire Gay Pride Parade, they found Dignity's presence on the Sidewalk, and its adherence to Catholic traditions and symbols, particularly objectionable. (See A56-57; Tr. 513)

In 1983, two gentlemen named Andrew McCauley and Herbert McKay created the so-called "Committee for the Defense of St. Patrick's" (the "Committee") to combat what they thought was a "symbolic desecration" of the Cathedral. The Committee



coordinates opposition to the Parade by various anti-gay groups. Keeping Dignity and other gay organizations off the Sidewalk is one of the anti-gay groups' major purposes, and as long as Dignity or other gays are banned from the Sidewalk, the anti-gay groups state that they have no interest in being there. (A54-55, A57-58, A146)

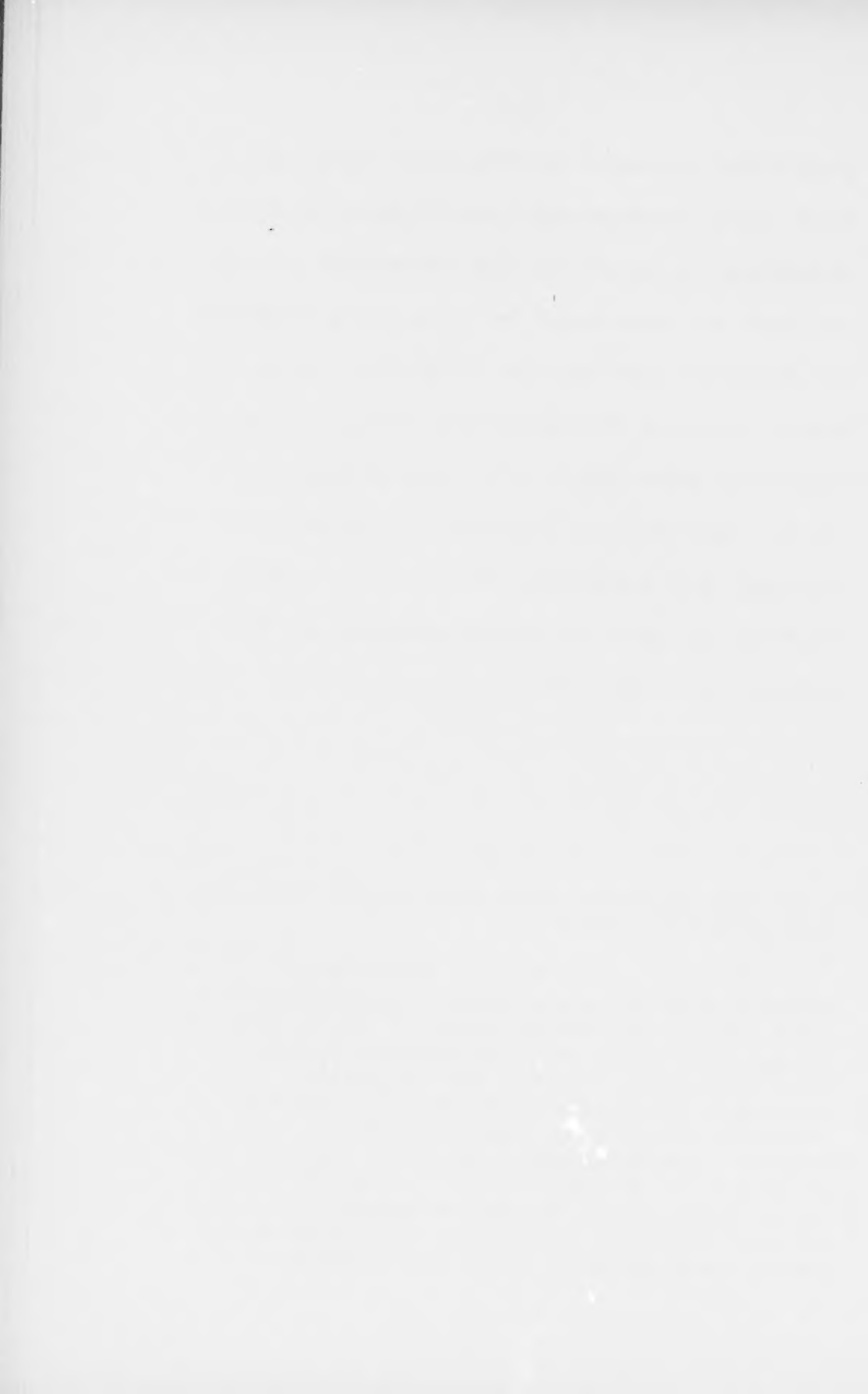
Since 1983, the Department has held meetings at police headquarters with representatives of the anti-gay groups, including Messrs. McKay and McCauley, in order to ascertain their intentions for the upcoming Parade. At each of these meetings, the anti-gay groups expressed their fervent opposition to Dignity's presence on the Cathedral Sidewalk. Police Department officers stated that it was from these meetings, and from their own independent evaluation of the

political climate in New York City, 4/ that they determined that Dignity's mere presence in front of the Cathedral would in fact be construed by some as a "symbolic desecration" of the Cathedral, and would thereby increase the possibility of violence from these anti-gay groups.

(A58) The Police Department therefore "froze" the Sidewalk, forbidding access to Dignity as well as other members of the public. 5/ (A51-52)

4/ See A86-87. See also infra note 35 and accompanying text.

5/ In 1983, the Police Department established an alternative demonstration area on the sidewalk west of Fifth Avenue (i.e. away from the Cathedral) between 51st and 52nd Streets for Dignity. In 1984 and thereafter, this alternative demonstration area was located on 51st Street, approximately 35 feet west of the curblin of Fifth Avenue. Dignity has never used these areas, however, in light of the negative symbolism conveyed by being shunted away from the Cathedral.



The Police Department itself states that, were it not for the opposition of the anti-gay groups, it would open the Sidewalk to Dignity as it did before 1983. (A84, A86) As the district court found, therefore, the Police Department's decision to close the Cathedral Sidewalk was made "precisely to allay objections of anti-gay and anti-Dignity counterdemonstrators". 6/ (A86) It was this action that formed the basis of this case.

6/ The satisfaction of the anti-gay groups was noted to Chief Kerins:

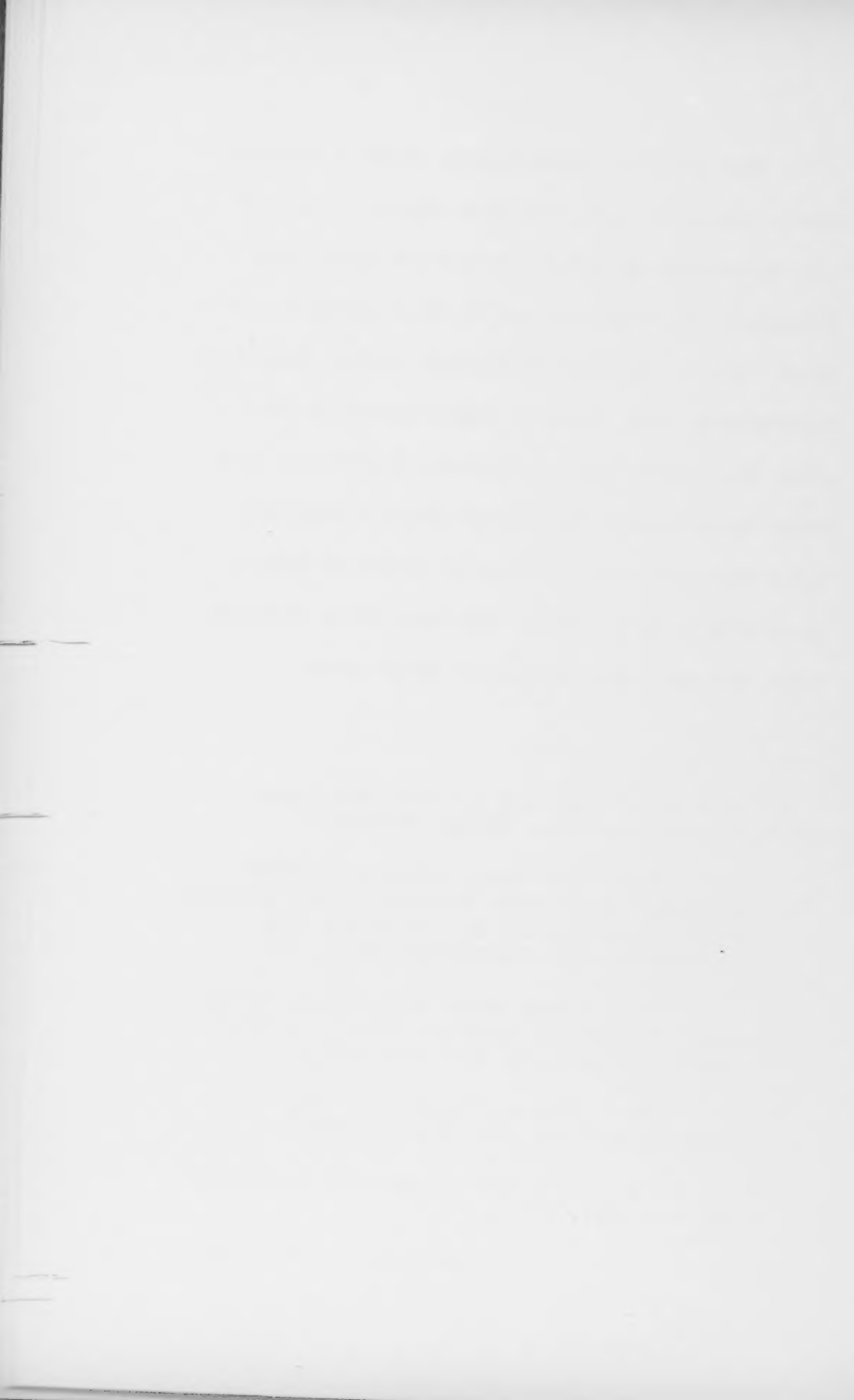
"Q. Did they [the anti-gay groups] indicate whether they agreed with that decision [closing the Sidewalk] or disagreed with it?

"A. They were satisfied with that decision because that is what their objective was all about.

"Q. Was to keep the Dignity demonstrators off the sidewalk?

"A. Off the sidewalk in front of St. Patrick's."

(footnote continued)



C. The History of the Gay Pride Parade

In sharp contrast to the predictions of violence hypothesized by the Police Department, one of the most distinctive features about the Gay Pride Parade has been the historically uneventful coexistence between Parade participants, including Dignity, and the anti-gay groups. This peaceful coexistence includes years in which Dignity was permitted on the Sidewalk, and has continued despite the presence of varying numbers of antagonistic anti-gay onlookers since 1981. 7/ (See A67, A74, A82, CA2 Op.: A11-12 n.1)

(continued)

PX 1, p. 205 (deposition of G. Kerins); A87-88.

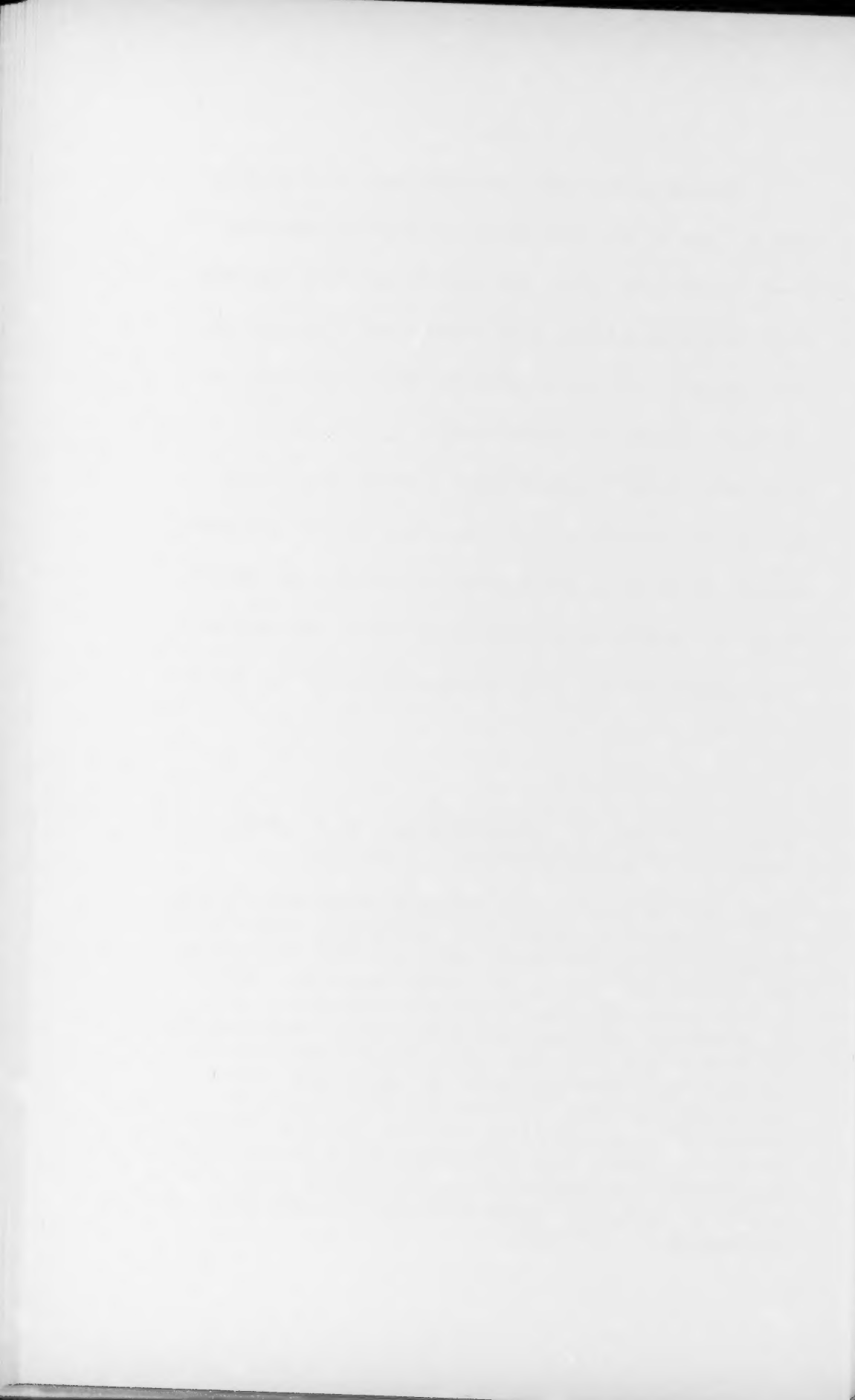
7/ The anti-gay demonstrators have drawn their participants for the most part from local chapters of the Catholic War Veterans, the Knights of Columbus, the



These anti-gay groups are now assigned an area by the police approximately 35 feet from the line of march of the Parade, well within sight and sound of the marchers (and also well within throwing range, if they were so inclined). 8/ Nonetheless, there have never been any incidents of violence at the Gay Pride Parade, apart from two scuffles in 1981, in which Messrs. McKay and McCauley were arrested for confronting gay demonstrators in front

Ancient Order of Hibernians, and other Catholic organizations. (A52-54)

8/ Since 1984, the Police Department has established an area for anti-gay groups on 50th Street, 35 feet west of the curbline of Fifth Avenue. In 1983, however (the first year of the Sidewalk freeze), the Department placed the anti-gay contingent on the sidewalk directly abutting the line of march. The purpose of placing the anti-gay groups closer to the line of march was, according to the Police Department, so that the anti-gay groups could see that the Department had kept its promise not to allow gay groups on the Sidewalk. (A67-68)

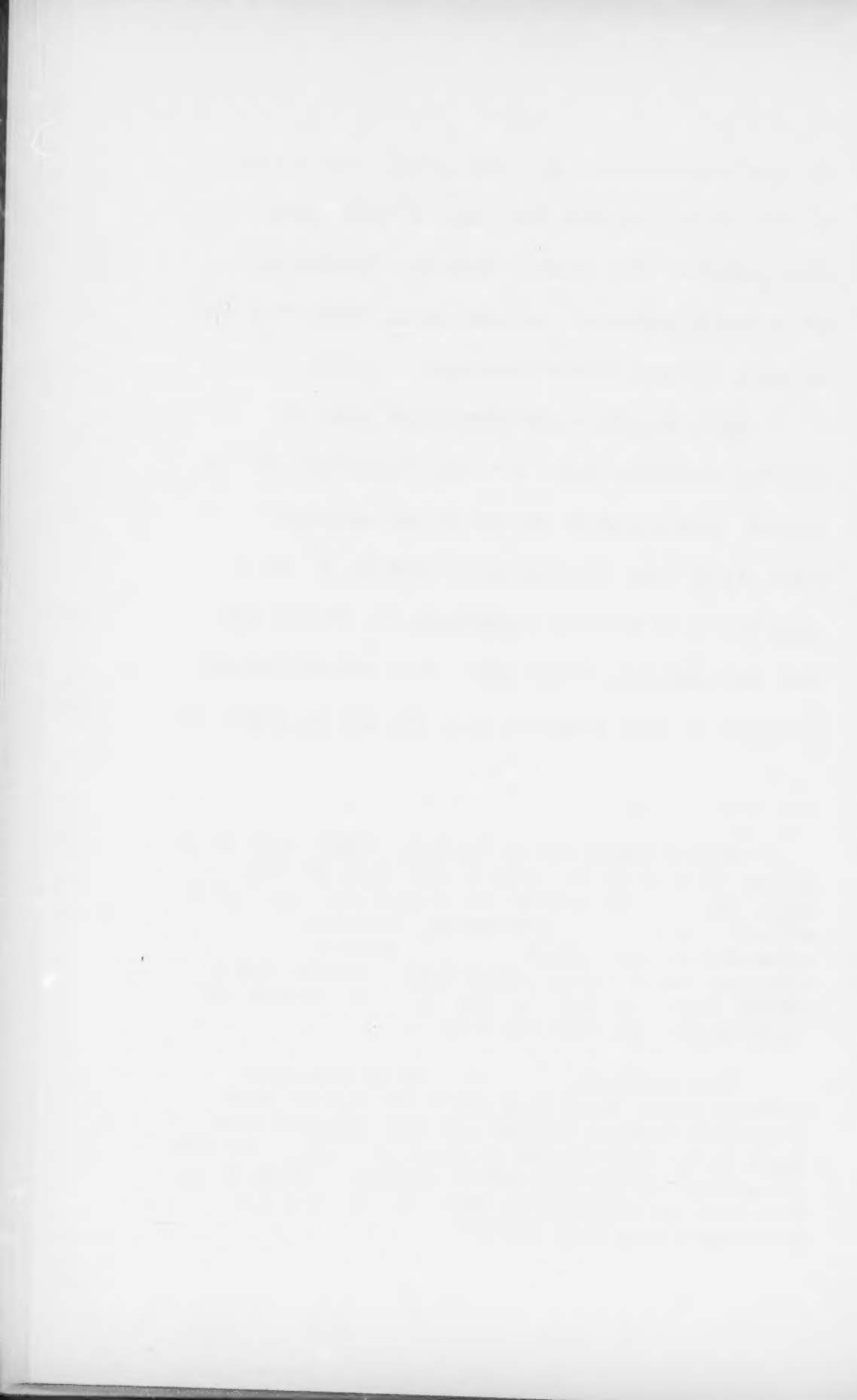


of the Cathedral. 9/ In 1982, when the front of the Cathedral was again open to the public, Mr. McKay and Mr. McCauley were both present in the area, but did not engage in any altercations. (A62)

This history of non-violence is hardly surprising. As the district court found, although some anti-gay groups certainly had profound objections to Dignity's symbolic presence in front of the Cathedral, they were all established groups in the community with no history or

9/ There were no injuries resulting from these encounters, and McKay and McCauley were merely detained in a police van until after the Parade was over, issued summonses, and sent home. (A60-61) Charges were later dropped. These incidents are the only arguable instances of "violence" at the Parade.

The district court noted the genuinely surprised demeanor of McKay and McCauley during trial at the suggestion that they now would resist police commands to desist from violence (A102). See also Tr. 531-32 (McCauley acts so as to avoid getting arrested again).

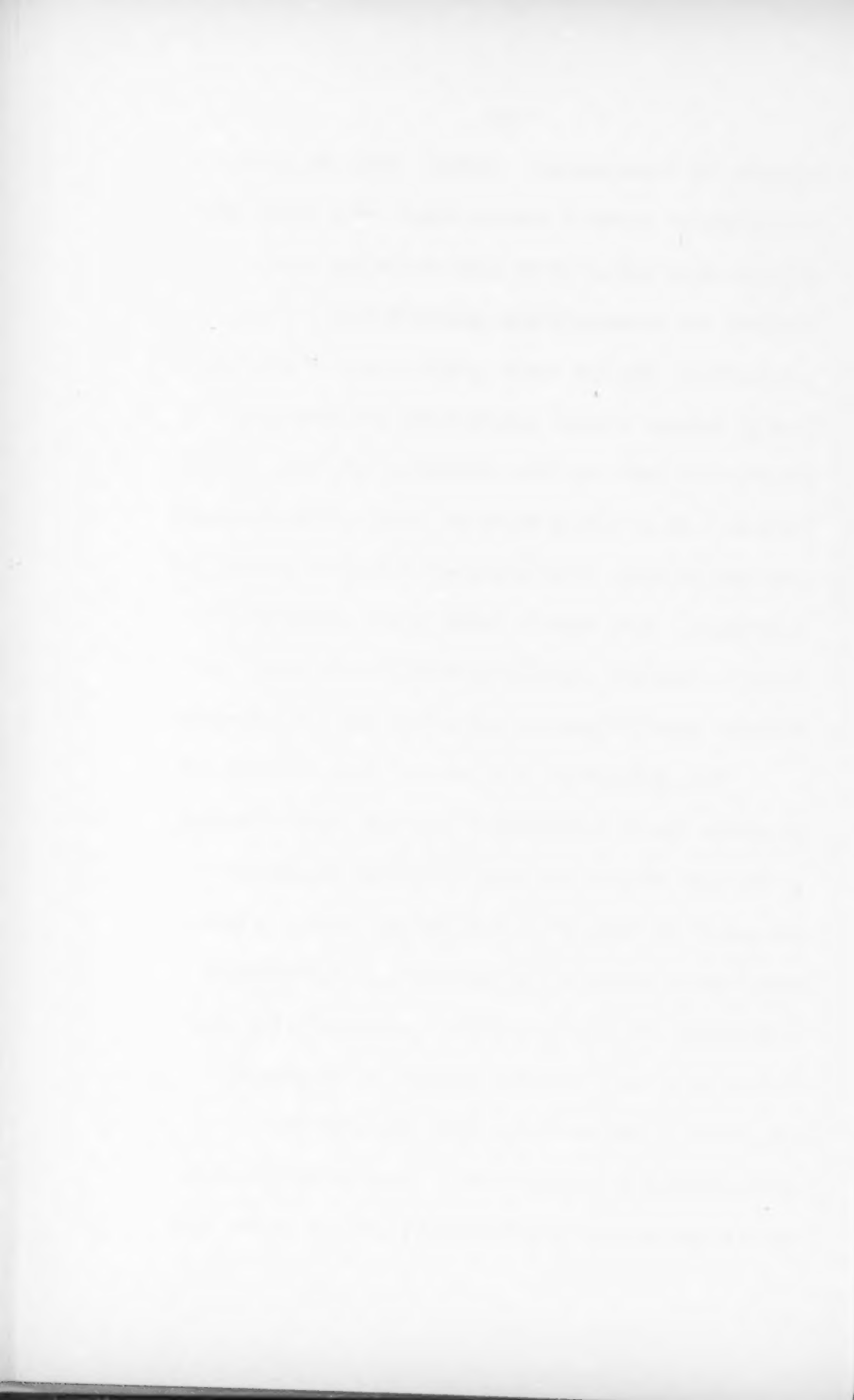


agenda of violence. (A53) The Police Department itself notes that the anti-gay groups are generally law abiding and intend to demonstrate peacefully.

(A101-03) While each year they unambiguously voice their antipathy to the gay community and to the message of the Parade, they have stated their theological and political differences without physical incident, and apart from some name-calling, without confrontation with the Parade participants passing by. (A116-17)

The peaceful nature of the Parade is perhaps best indicated by the most recent, 1986 Gay Pride Parade, during which 25 members of Dignity and 25 anti-gay adherents were both allowed on the Cathedral Sidewalk for 30 minutes, pursuant to the interim order of the court of appeals.

(A29-30) As before, the Parade was completely non-violent. The predictions of large scale confrontations if even two



members of Dignity were on the Sidewalk for more than a matter of seconds, upon which the police predicated their decision to ban Dignity from the Sidewalk, simply did not materialize.

In large part, the Department bases its alleged concerns about violence upon predictions of large numbers of anti-gay adherents appearing at the Parade. 10/ (A63) During the meetings between the Police Department and the anti-gay groups that have occurred prior to the Parade for the past four years, Messrs. McKay and McCauley have consistently predicted the presence of thousands of anti-gay demonstrators at the Parade. Remarkably, the

10/ The Police Department somehow distinguishes the danger of violence toward Dignity from the general hostility that might exist between the anti-gay groups and Parade marchers in general (A84-85), a hostility that, of course, would exist regardless of Dignity's presence on the Sidewalk.

Department relies on these predictions.

(A106) In reality, however, the anti-gay groups have never amassed more than 150 participants. 11/

The district court, based upon the long and peaceful history of the Parade, the Police Department's consistently exaggerated projections of the numbers of anti-gay onlookers who would appear, the lack of any articulable and substantiated reason to fear violence, and lastly upon its own evaluation of the lengthy

11/ The record indicates that the following number of anti-gay groups appeared at past Parades, as compared with the number predicted by anti-gay organizers to the police.

| <u>Year</u> | <u>Predicted</u> | <u>Actual</u> |
|-------------|------------------|---------------|
| 1983 | 25,000 | 100 |
| 1984 | "thousands" | 75 to 100 |
| 1985 | "thousands" | 140 to 150 |
| 1986 | 2000 to 3000 | 150 |

(A63-64, A67, A69, A72, A75-76, A80-81, A83; CA2 Op.: A11-12 n.1)

testimony of the responsible police officers, representatives of the anti-gay groups, and Dignity officers, concluded that the allegations of potential violence given by the police were not credible, or even if credible were not rational. 12/
(A135)

12/ The district court heard testimony from Commissioner Benjamin Ward (during the hearings for preliminary injunction), Assistant Chief of Police Gerard J. Kerins (the operational officer in charge of the Parades from 1984 to 1986), former Assistant Chief of Police Milton Schwartz (the operational officer in charge of the 1983 Parade), and Lieutenants David Tarantino and Joseph Congelosi (officers in the Patrol Borough Operations Unit responsible for planning police coverage of the Parade).

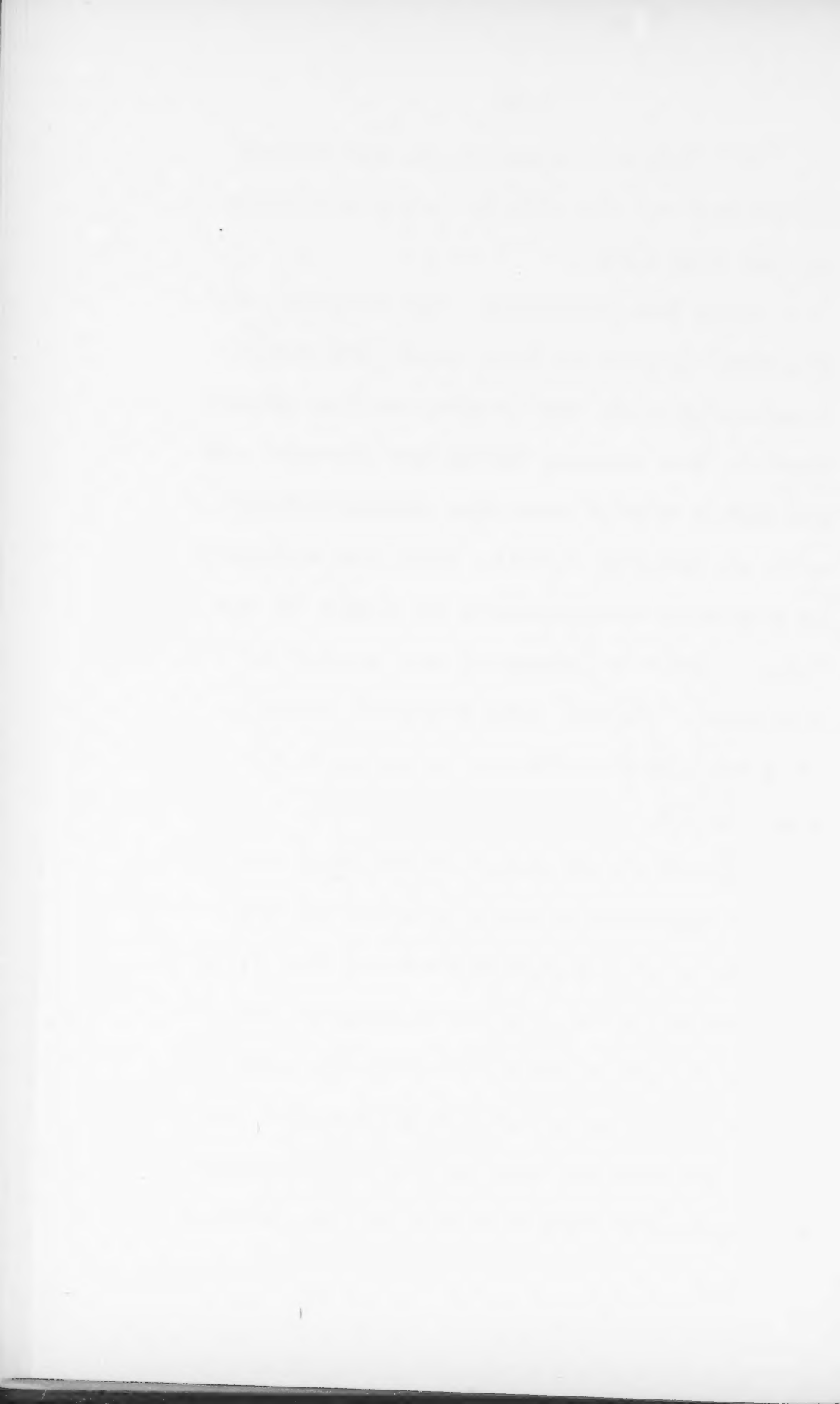
The court also heard the testimony of Messrs. McKay and McCauley (the leaders of the anti-gay groups), and of Matthew Foreman, Esq., and Timothy Coughlin, Esq. (officers of Dignity and participants in past Gay Pride Parades). Also testifying at trial was Monsignor James Rigney, the Rector of St. Patrick's Cathedral.



D. The Relationship of the Police Department to the the Catholic Hierarchy of New York City

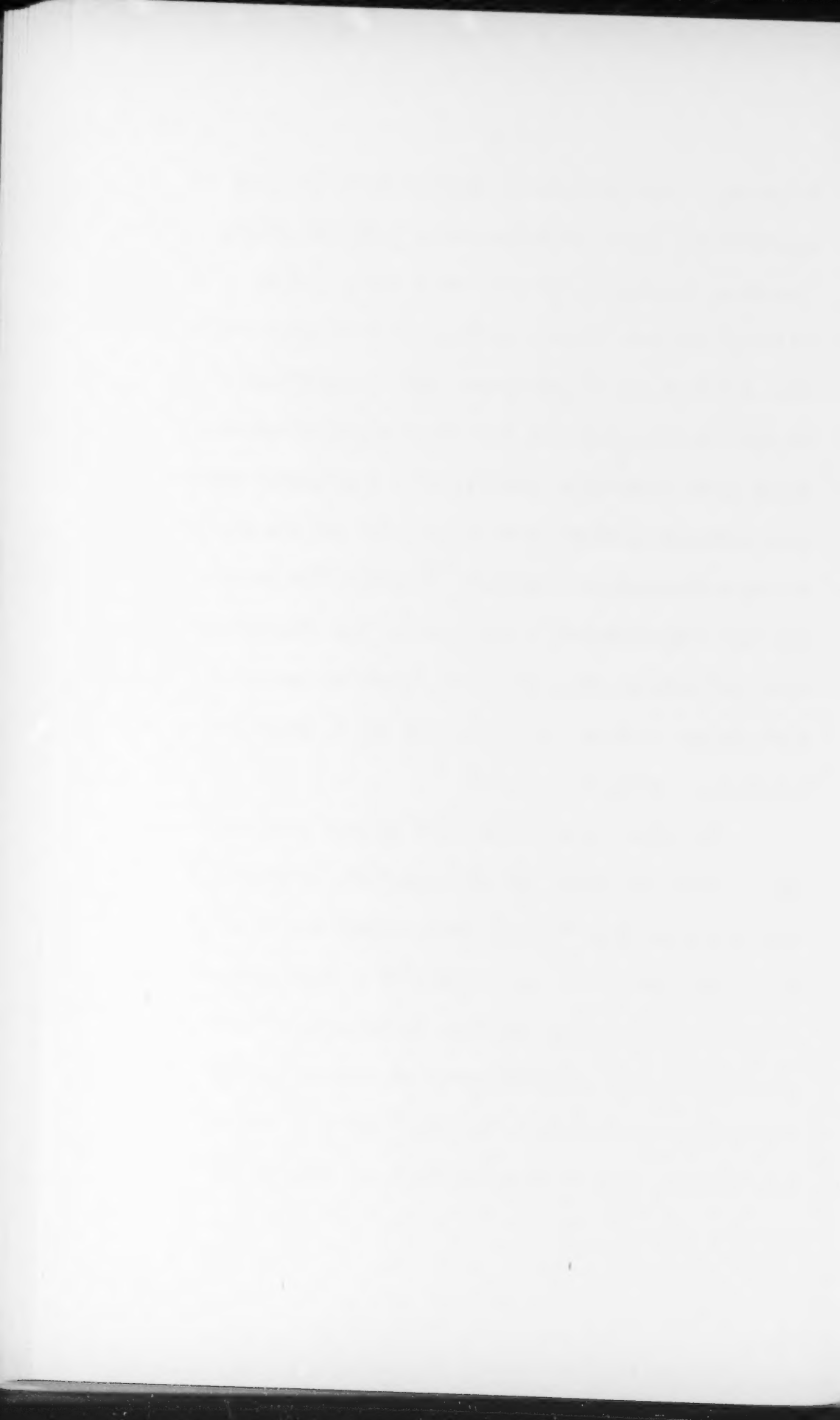
From the foregoing, the conduct of the Petitioners in this case, and their suggestion that the largest police department in the country could not control 150 peaceably minded anti-gay demonstrators without banning Dignity from the Sidewalk, is somewhat inexplicable in light of the "negligible" evidence of any danger of violence. (A135) The district court, however, found evidence to support an explanation.

The district court found that the Police Department had a history of complicity with the Archdiocese of New York in responding to Dignity's request for access to the Sidewalk. (A64-67, A69-71, A151-52) In 1983, when the "freeze" was first introduced, the police held secret meetings with Church hierarchy concerning



Dignity. An internal church memorandum generated from that meeting addressed to Terence Cardinal Cooke (the late Archbishop of New York) reflects a scheme with the police to offer post hoc justifications to the public for excluding Dignity from the Sidewalk (A66), and suggests that the police action was actually in response to the Church's request. (A151) At the Police Department's request, the Rector of the Cathedral denied that such a meeting had taken place, when asked by a Dignity leader. (A66-67)

In 1984, when Dignity again pressed its right to have access to the Sidewalk, the Police Department suggested to the Archdiocese that it schedule a special religious service at the Cathedral during the Parade to accommodate a facially secular explanation to Dignity for restricting its demonstration in front of



the Cathedral. 13/ The Acting Administrator of the Archdiocese in fact approved the idea, although in the end no such service was held. (A69-71)

For the 1986 Parade, the Police Department took the unusual step of contacting on its own initiative (the week before trial began) certain Catholic groups in the greater New York area (many of which had never appeared at prior Gay Pride Parades and with which even the Committee had not made contact) to see if they were interested in joining the anti-gay demonstrators. 14/ (A108-12)

13/ There was no regularly scheduled service at the Cathedral at the time the Parade passes by. Local ordinance restricts the use of sound devices within 500 feet of a church when a service is actually in progress. The Rector of the Cathedral (to whom this request was made), however, was under the impression that a demonstration would be totally forbidden if a service were held. (A70)

14/ Participation of these groups in

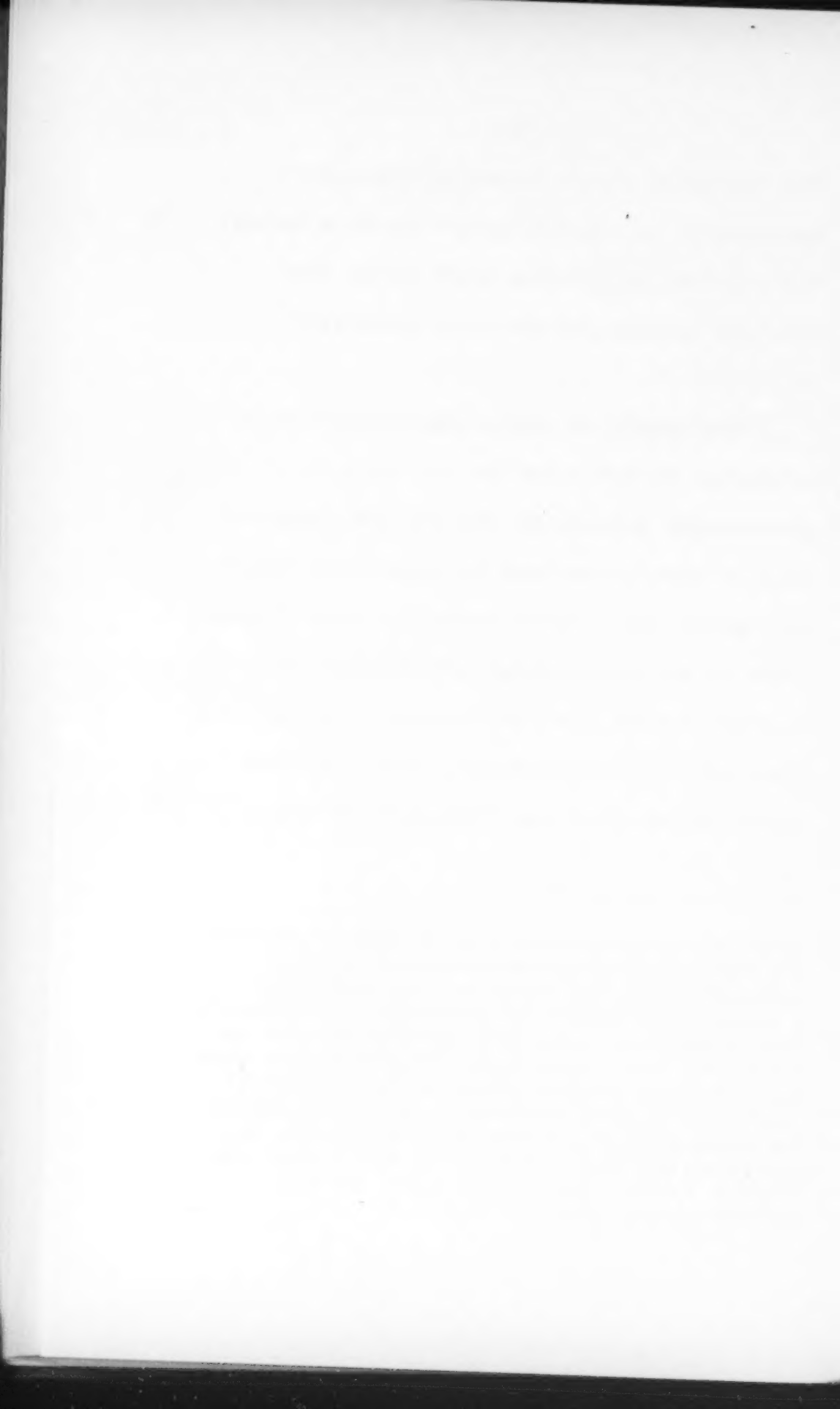


The district court found a "certain appearance of impropriety" in this behavior, which called the good faith and motives of the police into question.

(A110-11)

The district court considered this evidence in addition to the utterly pretextual nature of the Police Department's justifications in excluding Dignity, which that court found in itself might lead to an inferential conclusion of content-based discrimination. (A150) In view of all the evidence, the district court found that the "freeze" of the

1986 would presumably have lent credence to the previously exaggerated police estimates of the size of the anti-gay groups that would be present. Ironically, the number of anti-gay demonstrators in 1986 was 150, i.e. approximately the same as previous years, despite Petitioners' contention that anti-gay sentiment would be intensified in New York City due to, inter alia, the passage of the local Gay Rights Bill. See infra note 35 and accompanying text.



Sidewalk was the result of a covert attempt by the Police Department to appease the anti-gay groups and the Church. (A136, A151-52) The court of appeals concurred, stating that:

"In the instant case, we agree with the district court that the restrictions imposed were not drawn solely to further the government's conceded interest in public safety."
(CA2 Op.: A17)

REASONS FOR DENYING THE WRIT

Summary

The law announced by this Court for assessing government restrictions on speech is well-established, and was applied in a straightforward manner by the courts below. (A12-14, A140-43) Applying these tests, the district court first found that the restriction here failed the test of content neutrality and was therefore impermissible. (Part I) Alternatively, applying the test set forth in Clark v. Community for Creative



Non-Violence, 468 U.S. 288 (1984), the district court inquired whether the "freeze" was narrowly tailored to meet a significant government interest, but found that the police freeze failed that test as well. (Part II) The facts of this case may be remarkable, but the analysis employed was not.

I. THE DECLARATION OF UNCONSTITUTIONALITY WAS COMPELLED BY THIS COURT'S REPEATED PROHIBITIONS OF CONTENT-BASED DISCRIMINATIONS AGAINST SPEECH.

The premise Petitioners ask this Court to endorse is that, in assessing the validity of content-neutral time, place or manner restrictions on protected speech, the courts are completely incompetent to decide whether "good faith" police decisions are reasonable or at all supportable. The dubious value of this proposition is discussed infra. More importantly, as the record abundantly reveals, and

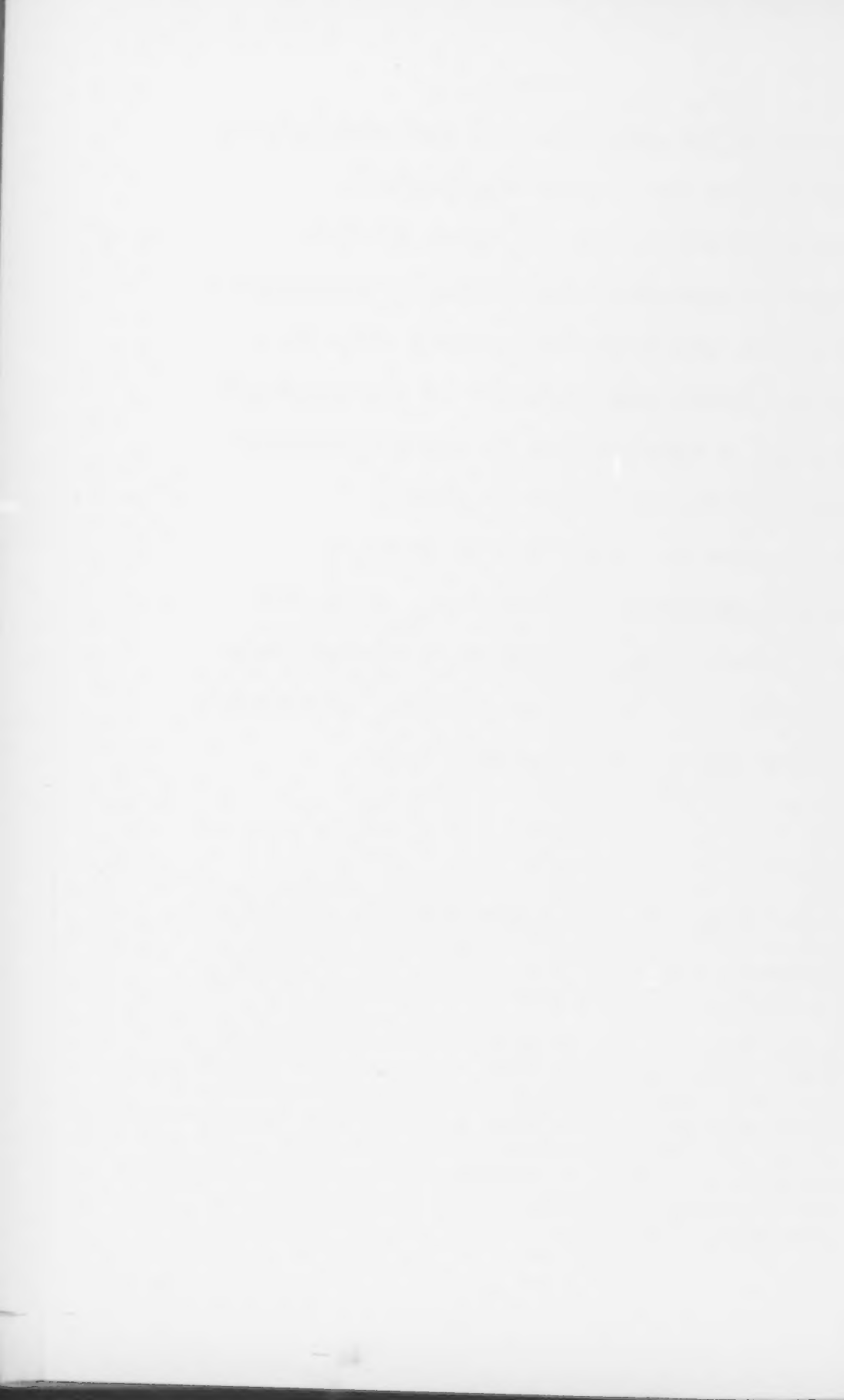


as the trial court found, the restriction imposed by the police was neither content-neutral nor in "good faith".

There is therefore no occasion to determine the question Petitioners seek to raise, since the "freeze" of the Sidewalk was not a time, place or manner restriction. Rather, it was an openly content-based, and what is more, a viewpoint-based restriction. Such restrictions are, of course, presumptively invalid. 15/ This, we contend, provides a speedy end to the analysis. 16/

15/ E.g., Police Department v. Mosley, 408 U.S. 92, 95 (1972); accord, Widmar v. Vincent, 454 U.S. 263, 276 (1984); Carey v. Brown, 447 U.S. 455, 465 (1980).

16/ Because of Respondents' success on their free speech claim, the courts below did not find it necessary to address the alternative ground that giving the Church effective discretionary control over access to a public sidewalk violated the Establishment Clause. See Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).



A. The Police Ban on Dignity's
Demonstration Constitutes a Heckler's
Veto.

The district court's finding that the police action was the result of content-based discrimination directed precisely at the content of Dignity's symbolic message is amply supported by the record, and indeed is, in many respects, based upon undisputed facts. The Police Department itself explains that it is the unique message conveyed by Dignity's mere presence on the Sidewalk that the anti-gay groups construe as a "symbolic desecration" of the Cathedral. It is this adverse reaction from the anti-gay demonstrators, and the alleged danger of violence engendered, that purportedly prompts the Police Department to remove Dignity from the Sidewalk.

This case presents the paradigmatic "heckler's veto" repeatedly held by this



Court to be an invalid basis for restricting the exercise of free speech. 17/ "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Street v. New York, 394 U.S. 576, 592 (1969). Indeed, the courts have

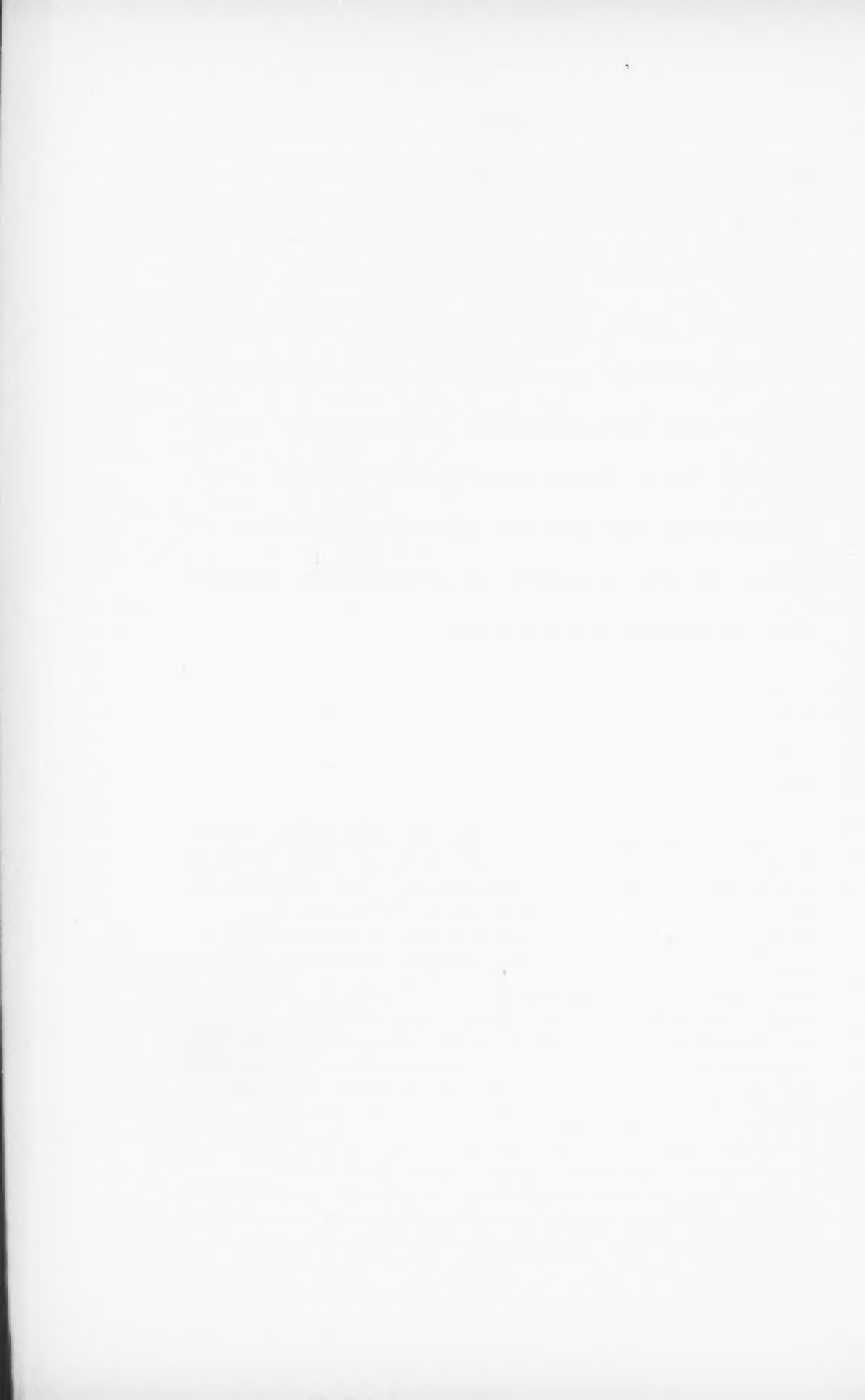
17/ E.g., Coates v. City of Cincinnati, 402 U.S. 611, 615-16 (1971); Bachellar v. Maryland, 397 U.S. 564, 567 (1970); Gregory v. City of Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Watson v. City of Memphis, 373 U.S. 526, 535 (1963); Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

Accord, Wiegand v. Seaver, 504 F.2d 303, 306 (5th Cir. 1974), appeal dismissed, 421 U.S. 924 (1975); Beckerman v. City of Tupelo, 664 F.2d 502, 509-10 (5th Cir. 1981); Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605, 611, 616-18, 373 N.E.2d 21, 22-23 (1978) (per curiam) (display of swastika by American Nazis could not be enjoined even though violence was threatened and an estimated 10,000-15,000 counterdemonstrators were scheduled to appear).



consistently rejected such heckler's vetoes even where the police are responding to violence actually occurring, not (as here) just the speculative possibility of violence (a possibility that is inherent in any large public gathering). 18/ In sum, this Court has consistently prohibited the police from buying its peace at the expense of protected, albeit controversial expression.

18/ In Gregory v. City of Chicago, 394 U.S. 111, the Court ruled that the police violated the First Amendment by arresting civil rights marchers for failure to disperse where the marchers themselves were orderly, but onlookers were unruly and hostile. Gregory involved a great deal of actual violence, in which onlookers threw eggs and rocks at the marchers (id. at 117)—something that has never occurred at the Gay Pride Parade (A99). In Gregory, then, the police action was a response to violence actually occurring at the time, whereas here defendants are imposing a prior restraint based on the mere possibility of violence from anti-gay observers of the Parade.



Petitioners blithely claim that "[t]here has been no attempt to 'grant the use of the forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views'". 19/ Yet the facts of this case reveal that this is exactly what has occurred. As the Police Department itself conceded, had Dignity's symbolic message been "more favored" or "less controversial", so as to allay the objections of the anti-gay demonstrators, then it would have granted access to the Sidewalk as in previous years. 20/

19/ Petition at 27 (quoting Police Department v. Mosley, 408 U.S. at 96).

20/ As Assistant Chief Gerard J. Kerins (the operational officer in charge of policing the Parade) testified:

"[T]he counterdemonstratos are not counterdemonstrating because they want to demonstrate in front of St. Patrick's, they are demonstrating because they don't want the other

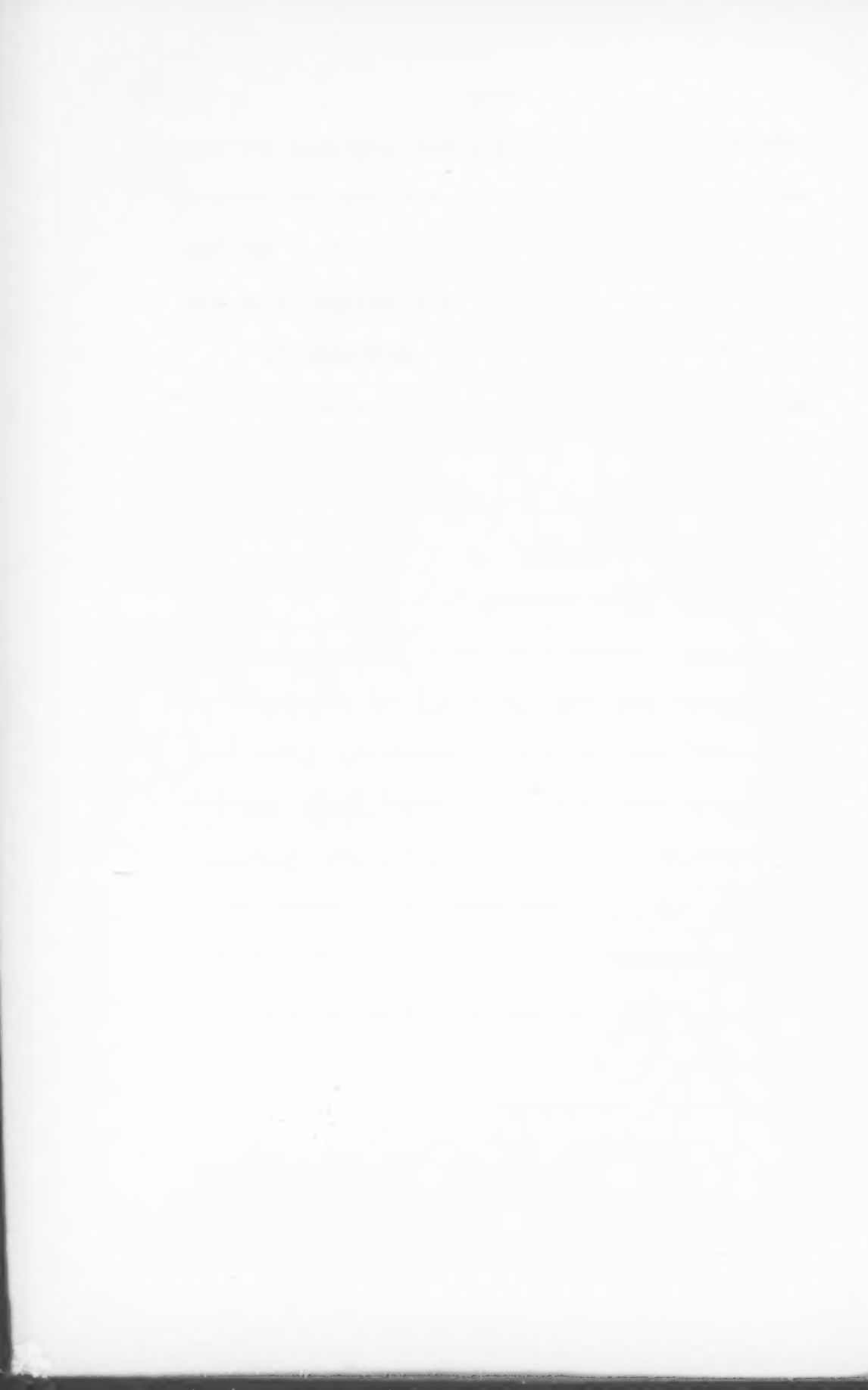


(A84-86) It therefore has engaged in pure content discrimination, and not in neutral time, place or manner regulation. As the district court found, "The matter and not the manner of plaintiffs' message is precisely the reason for its restriction."

(A143-44)

Petitioners' repeated characterization of the "freeze" as a "de minimis" intrusion into Dignity's speech is simply illogical, since the very reason articulated for the "freeze" was to suppress the symbolic speech that apparently irks the anti-gay contingent. Indeed, one issue upon which Dignity, the anti-gay groups, and the Police Department all agree is that the symbolism inherent in Dignity's mere presence on the Sidewalk is the

group [Dignity] demonstrating there in what they consider to be a desecration of the Cathedral". (Tr. 413)



operative event in the controversy, not the words or signs used (Tr. 15-16, 366-67, 608-09). 21/ It is for this reason that Dignity seeks access to the Sidewalk, that the anti-gay groups object to such use of the Sidewalk (Tr. 513, 567-70, 572-73), and that the Police Department removed Dignity from the Sidewalk (Tr. 363-64, 901).

Although the Petitioners now concede, as they must, that the "content of respondents' speech is not unrelated to the need to keep the Cathedral sidewalk closed" (Petition at 28), they contend that they

21/ The expressive activity here is thus analogous to those historic cases dealing with sit-ins or demonstrations by blacks in segregated areas. Brown v. Louisiana, 383 U.S. 131 (1966) ("silent and reproachful presence" by blacks in segregated library); Taylor v. Louisiana, 370 U.S. 154 (1962) (blacks present at "whites only" bus depot waiting room); Garner v. Louisiana, 368 U.S. 157 (1961) (black sit-in at "white" lunch counter).

are motivated only by a desire to avoid the "secondary effects" of such speech, citing City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986).

Renton, however, does not alter the applicable jurisprudence and allow content-sensitive regulations to be justified by a "pure heart" defense. 22/ In the first place, the decision in Renton rested in large part upon the trial court's factual finding that the predominate intent of the city council in enacting the zoning ordinance in question was directed not at the content of the speech but at the secondary effects of adult movie theatres on the community. 106 S. Ct. at 929. Here, the trial court

22/ Even if one were to read Renton as condoning some type of content-based discrimination, it certainly cannot be said to encompass viewpoint-based discrimination, such as is present here.

rendered a factual finding precisely to the contrary (A149), and thus Renton is inapplicable.

Perhaps more fundamentally, it cannot be seriously contended that the Renton Court intended to do away sub silentio with the responsibility of the police to protect controversial speech from the prospect of a hostile audience. Nor can the Police Department's suggestion that its action is made pure by the fact that its ultimate motive is to preserve public safety (a factual contention soundly refuted by the district court) sanction the intentional suppression of Dignity's message. 23/ If a listener's reaction to

23/ Petitioners also attempt to distinguish the heckler's veto cases as involving criminal prosecutions of demonstrators for breaching the peace by antagonizing onlookers (Petition at 27), thus implying that enacting a prior restraint without arresting Dignity members does not raise constitutional



the content of speech qualifies as a "secondary effect", then there is nothing left to the the "heckler's veto" doctrine, since such cases invariably involve colorable invocation of the police power and responsibility to preserve public safety.

B. Even if This Were Not a Heckler's Veto Situation, the Police Engaged in Subjective Discrimination Against Dignity.

Moreover, the district court found the existence of another basis for its

concerns. This ill-conceived argument, which condones censorship as long as it avoids punishment, is obviously faulty. The heckler's veto doctrine applies not only to prosecution for inducing unrest from unruly spectators, but also to the affirmative obligation of the police to protect speakers against hostile audiences seeking to suppress them. See generally Collin v. Chicago Park District, 460 F.2d 746 (7th Cir. 1972); Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667 (N.D. Ill. 1976); Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).



finding of content discrimination, which refutes the Police Department's claims to a "pure heart", i.e. the somewhat startling evidence of the Police Department's history of complicity with the Archdiocese, leading to the conclusion that the police acted not out of concern for the public safety but out of subjective sympathy with the institutional Church.

(A136, A150-52; see supra pp. 19-23)

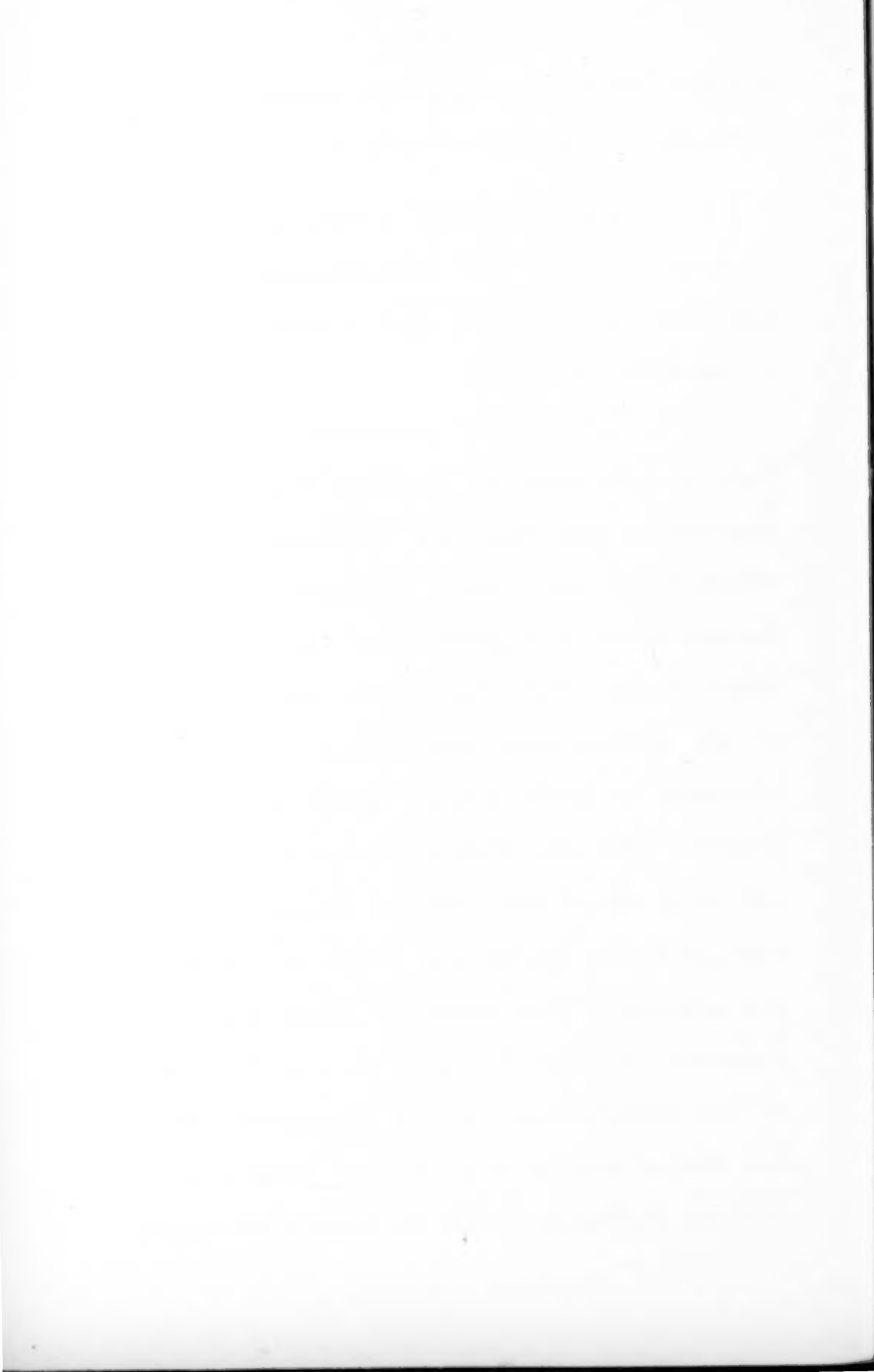
These findings are virtually ignored by Petitioners.

Thus, the finding that the police action in closing the Sidewalk to Dignity is content-based forecloses further analysis under the time, place or manner rationale. Content-based regulations must be justified, if at all, under the stringent "compelling state interest" and "clear and present danger" tests, i.e. extreme circumstances that Petitioners do not even argue are satisfied here. This,

without more, suggests the absence of a need for plenary review by this Court.

II. THE CHALLENGED ACTION BY PETITIONERS, EVEN IF NOT CONTENT-BASED, IS NOT NARROWLY TAILORED TO MEET A SUBSTANTIAL GOVERNMENT INTEREST.

Even if it were necessary to go further and consider whether the proposed regulation was narrowly tailored to meet a substantial government interest, the record below indicates, and the district court found, that the stated apprehensions of the police that they could not prevent violence on Fifth Avenue short of banning Dignity from the Sidewalk were groundless, and thus could not justify intrusive regulation of Dignity's right to convey its message. Particularly given the district court's reliance on its judgment of the credibility of the witnesses, and the strict standard of review from its factual findings, this is hardly an issue



that calls for further review by this Court.

A. The Scope of Judicial Review.

A public sidewalk is of course a quintessential public forum. 24/ Even content-neutral restrictions on the right to demonstrate there are limited to narrowly tailored time, place and manner regulations. Petitioners suggest that judicial review of the constitutionality of such police decisions is reduced to the syllogism that (1) the validity of the police action depends merely on its colorable rationality, and (2) in determining that rationality, the courts must rely exclusively on the police's own assertions. Indeed, the Petition does

24/ E.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Hague v. CIO, 307 U.S. 496, 515-16 (1939).



little more than speak frequently and fondly of the truism that the police are charged with protecting public safety, and then invoke the conclusory and unsupported statements that the Police Department thinks Dignity's presence on the Sidewalk would create a potentially violent situation.

Clearly, the role of the courts is more than to engage in the circularity urged by Petitioners:

"Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force. This Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.'" 25/

25/ City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034, 2038 (1986) (citations omitted; quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984)). Accord, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978)



The constitutionality of even otherwise valid time, place or manner restrictions is dependent upon "the availability of expeditious judicial review of the . . . refusal of a permit". 26/ Thus, in

(court must "make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance").

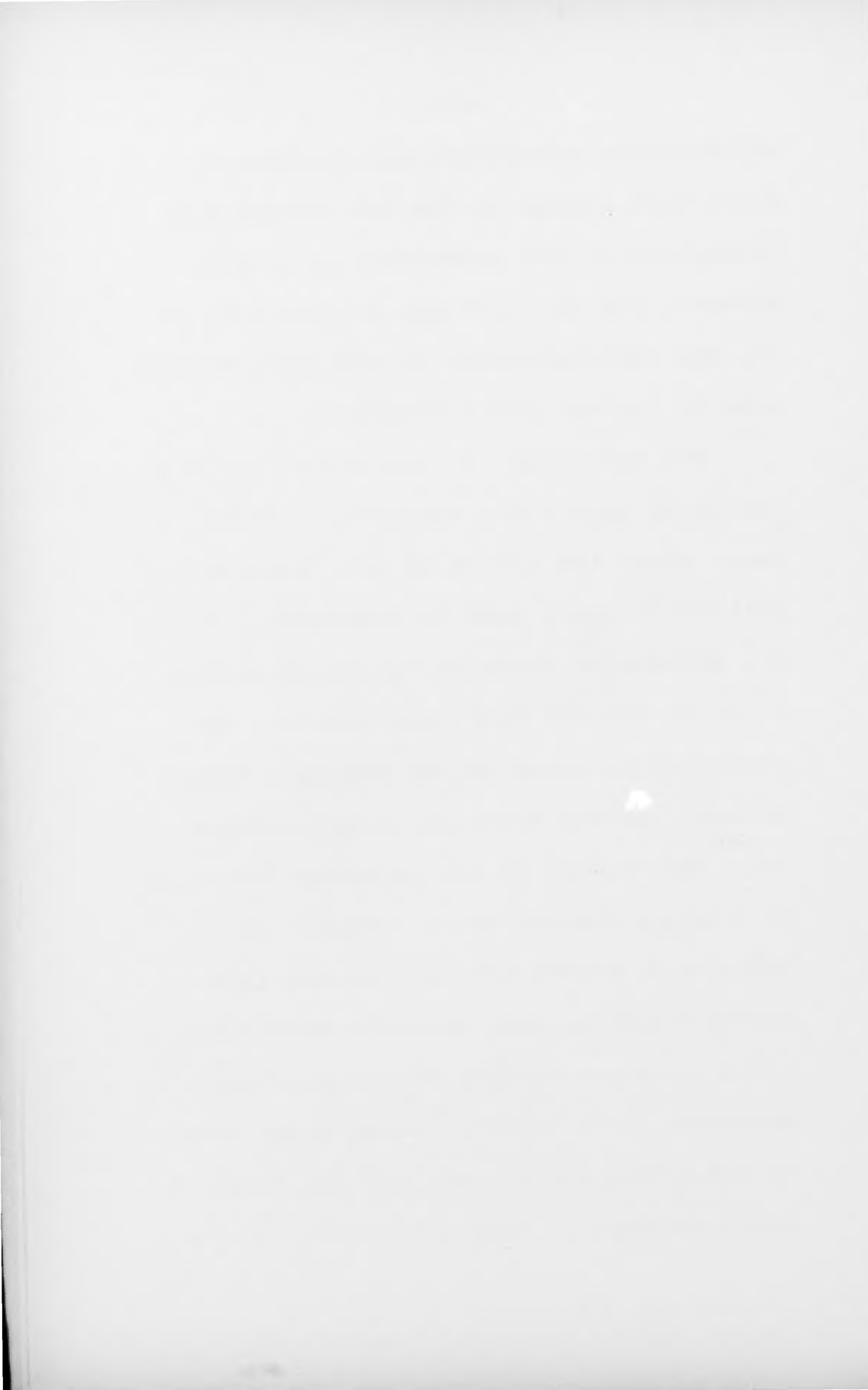
26/ Shuttlesworth v. City of Birmingham, 394 U.S. 147, 155 n.4 (1969); accord, Freedman v. Maryland, 380 U.S. 51 (1965). As the court of appeals aptly noted in addressing the judicial function:

"A court's power to review government restrictions imposed on the exercise of a First Amendment right occupies middle ground between extremes. It does not kowtow without question to agency expertise, nor does it dispense justice according to notions of individual expedience 'like a kadi sitting under a tree'. 'Because the excuses offered for refusing to permit the fullest scope of free speech are often disguised, a court must carefully sort through the reasons offered to see if they are genuine.' The district court performed that sorting process by means of the full trial that it conducted and the thorough opinion it handed down." CA2 Op.: A15-16 (citations omitted).



adjudicating constitutional rights, a court must engage in its own independent inspection of the government interests alleged, and at least the rationality if not the reasonableness of the restrictions used to further those interests.

The necessity of independent judicial review is especially apparent in this case, given the nature of the "regulation" that Petitioners seek to vindicate. While the defendants claim to be acting within § 435 of the New York City Charter, the restraint at issue is not really a "regulation", in the sense of an articulable rule, but rather is the purported exercise of a broad discretionary judgment by individual police officers to restrain speech based on such variable determinations as their reading of the political barometer (Tr. 382-86). (See infra note 35 and accompanying text (citing district court opinion)) Such discretion, if not

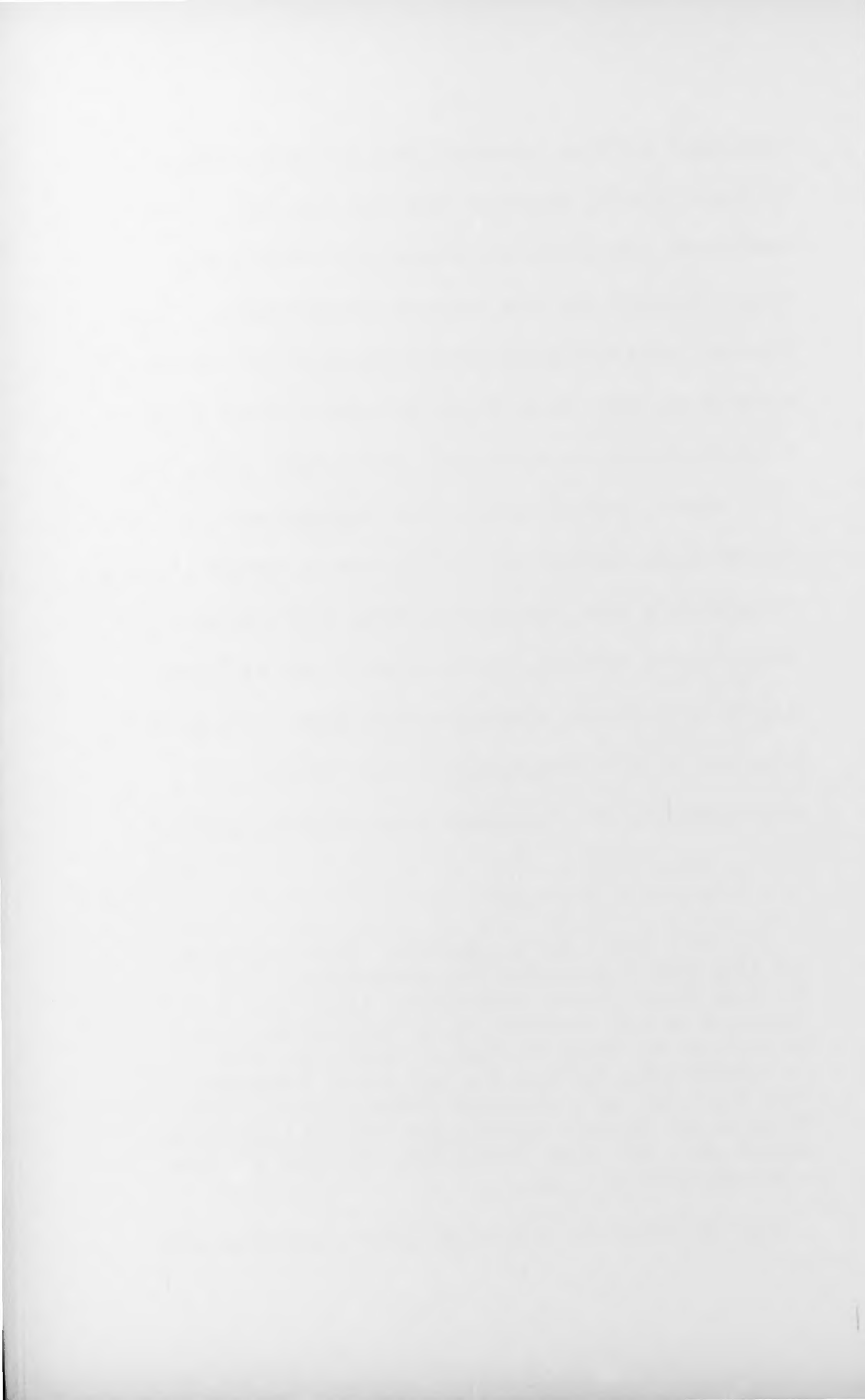


tempered by the possibility of judicial review, would empower the police to restrict any demonstration virtually at will, since, as the Police Department states, essentially every demonstration or parade in New York City is associated with a particular controversy or issue. 27/

Thus, ironically, the unchecked discretion sought by Petitioners would create its own constitutional infirmity. Restraints sought to be justified as time, place or manner restrictions must not give the officials responsible for their enforcement an unguided discretion, 28/

27/ Tr. 380; PX 1, p.235. For example, of the major parades in Manhattan, the Police Department testified that the St. Patrick's Day Parade is affected by the controversy over Northern Ireland, the Columbus Day Parade by friction between the Spanish and Italian communities, the Salute to Israel Parade by the Palestinian question, and the India Day Parade by the Sikh question. Id.

28/ Heffron v. International Society for



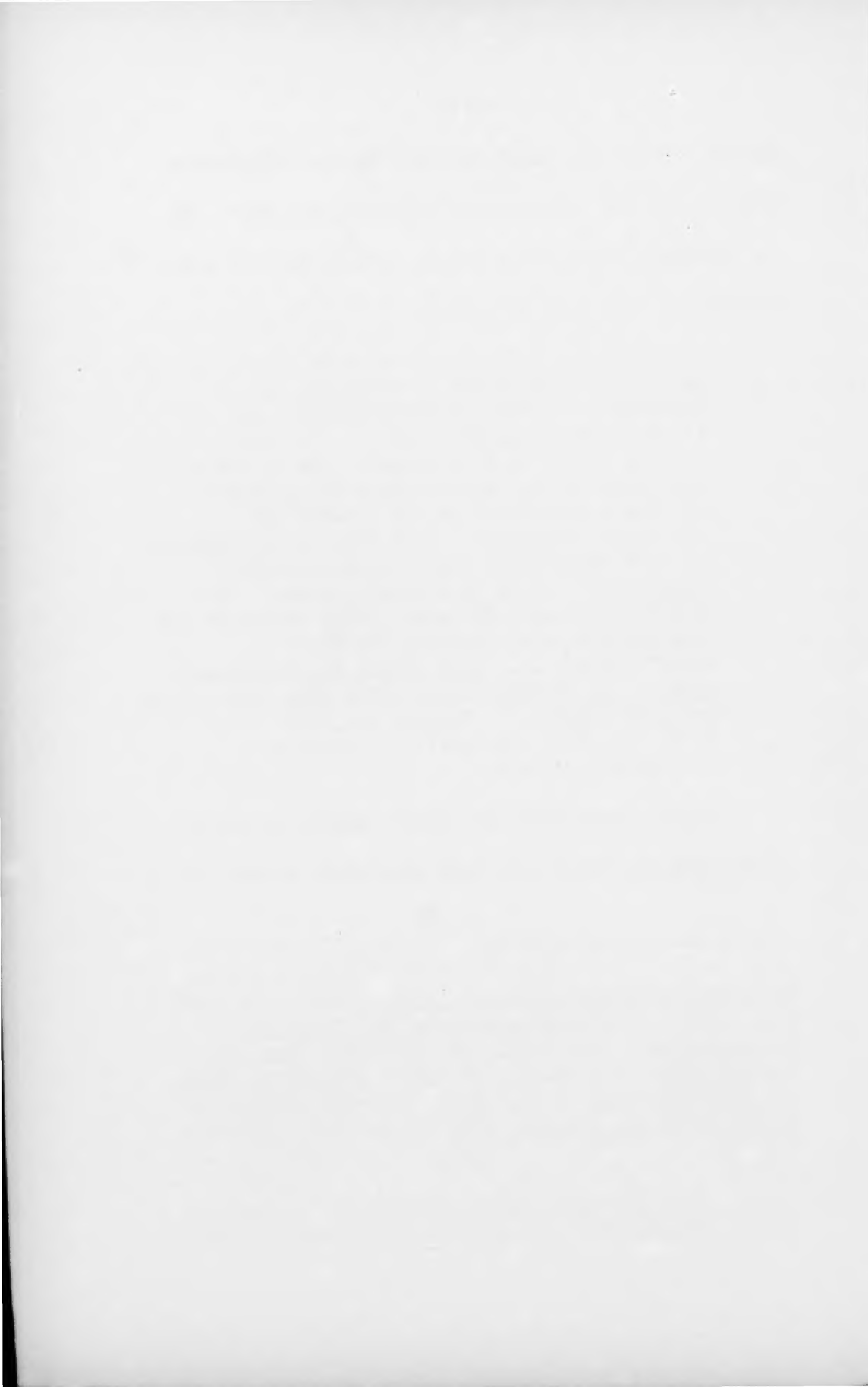
which could be used covertly to suppress the views of unpopular speakers. 29/ It is unconstitutional to grant a government official the ability

"to refuse a permit on his mere opinion that such a refusal will prevent 'riots, disturbances or disorderly assemblage'. It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." Hague v. CIO, 307 U.S. at 516 (plurality opinion; emphasis added).

Here, the Police Department's mere incantation that it has decided there is a

Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981); Shuttlesworth v. City of Birmingham, 394 U.S. at 150-53; Cox v. Louisiana, 379 U.S. at 557; Staub v. City of Baxley, 355 U.S. 313, 321-25 (1958); Schneider v. State, 308 U.S. 147, 163-64 (1939).

29/ See Cornelius v. NAACP Leg. Def. & Educ. Fund, 105 S. Ct. 3439, 3455 (1985).



potential for violence does not relieve it of its "duty to maintain order in connection with the exercise of the right" of Dignity to engage in its symbolic expression. Petitioners' ambitious suggestion that the courts should be removed from any meaningful oversight role in checking the use of police power to restrict speech is simply too extreme to warrant plenary consideration. 30/

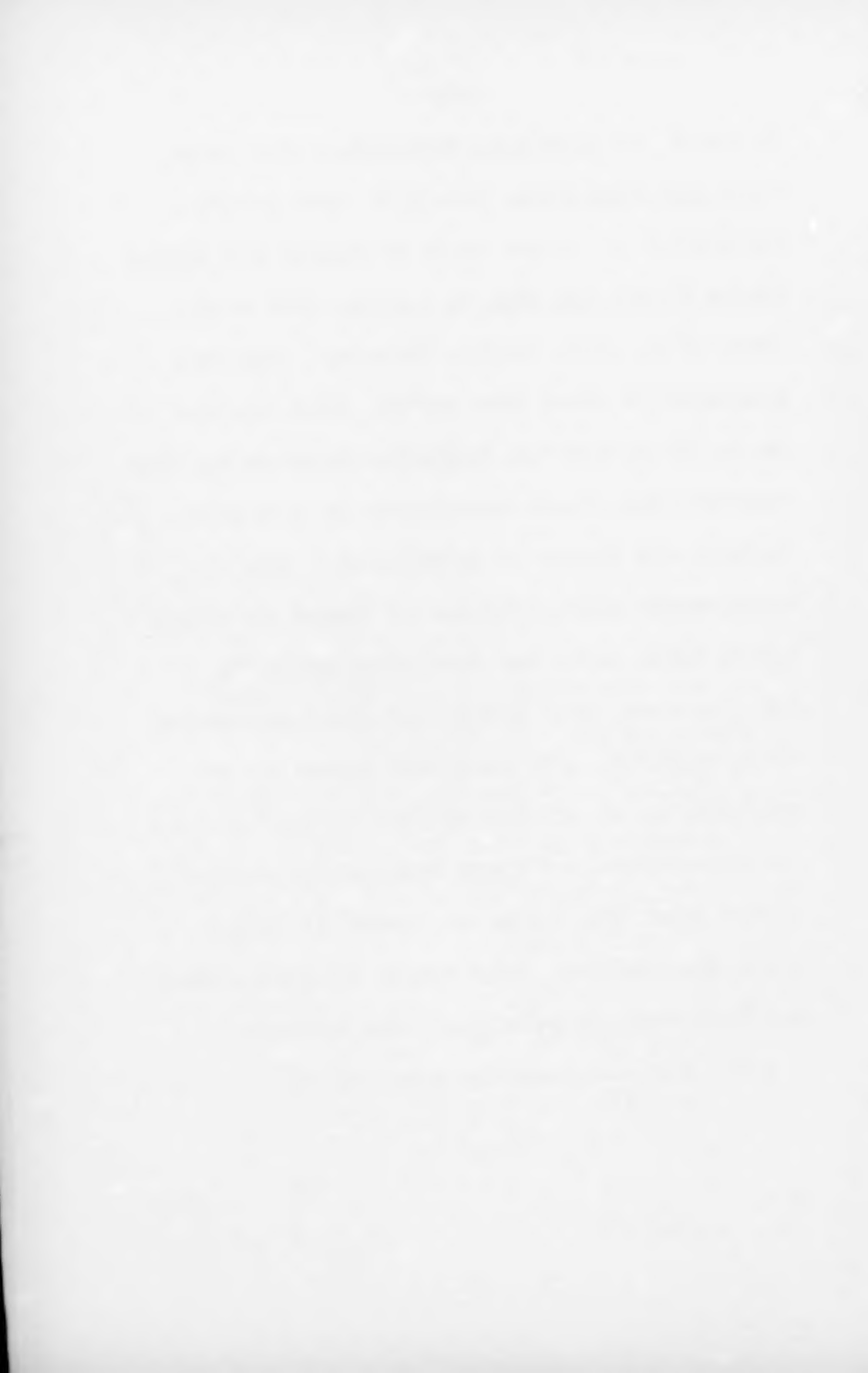
B. The Standards of Clark Were Followed Below.

Petitioners attempt to make out some inconsistency between application of the law by the courts below and this Court's

30/ It is interesting to note that, to a very generous degree, the district court did defer to police "expertise". Despite the indications of police bad faith in this matter, the district court adopted the plan formulated by the police itself in crafting equitable relief. (A158-59)



decision in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). Reference to cases such as Clark and White House Vigil for ERA v. Clark, 746 F.2d 1518 (D.C. Cir. 1984), however, for the proposition that the courts must always defer to executive judgment concerning the appropriate steps necessary to preserve safety and order is misplaced. The government restrictions at issue in those cases were codified and long-standing regulations, the result of administrative fact-finding, and were not shown to be applied in an ad hoc manner in particular controversies. It was basically undisputed that the rules at issue in Clark were a normally valid means of protecting against wear and tear in the national parks, and universally applied to



everyone. 31/ Since such codified regulations, if applied as written, are not susceptible to discriminatory application, the only constitutional question that

31/ Moreover, analogy to the regulations upheld in Clark and White House Vigil is inapt, since the restriction Petitioners seek to impose here is of a qualitatively different type. The demonstrators in both those cases were not denied access to demonstrate in the unique location of their choice. Indeed, White House Vigil suggested that totally banning the demonstrators from the White House sidewalk would be unconstitutional. 746 F.2d at 1527. Accord, United States v. Grace, 461 U.S. 171 (1983) (unconstitutional to ban leafleters from Supreme Court sidewalk and to move them across the street).

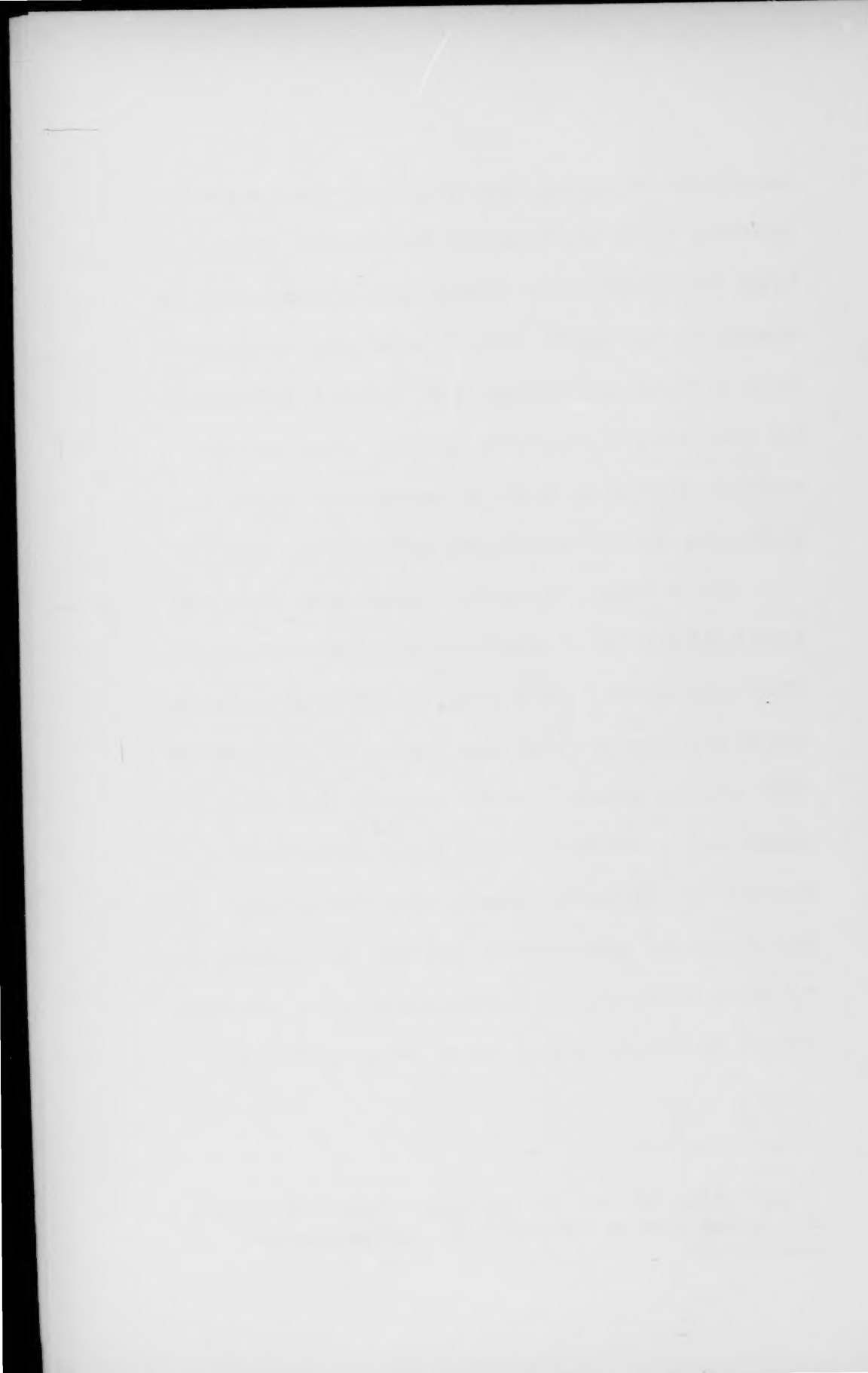
Clark involved restrictions on the manner of the demonstration, i.e. overnight camping in Lafayette Park. White House Vigil involved requirements on the construction of signs, the placement of parcels, and the amount and position of the area that the demonstrators could occupy on the White House sidewalk. Here, the manner of Dignity's demonstration (praying and singing) has never been an issue, and Dignity has always agreed to restrict its demonstration to a specific number enclosed within police barricades. Thus, the closer analogy to the restrictions upheld in Clark and White House Vigil is the plan that Dignity itself sought.



remained in Clark was whether they were drafted with sufficient technical expertise to effectuate their goals narrowly, a question to which the courts may well give substantial (although not total) deference to the administrative agency that deliberated upon and then promulgated them pursuant to rule-making authority. 32/

This case, however, does not involve application of a statute or institutionalized practice. The City Charter provision granting the police the power to "preserve the public peace" is of course not in question. Rather, this case involves review of an individual, discretionary decision by particular police officials as to what they claim is necessary to execute their function under that very general

32/ Similarly, in Renton, the ordinance at issue was a considered legislative enactment.



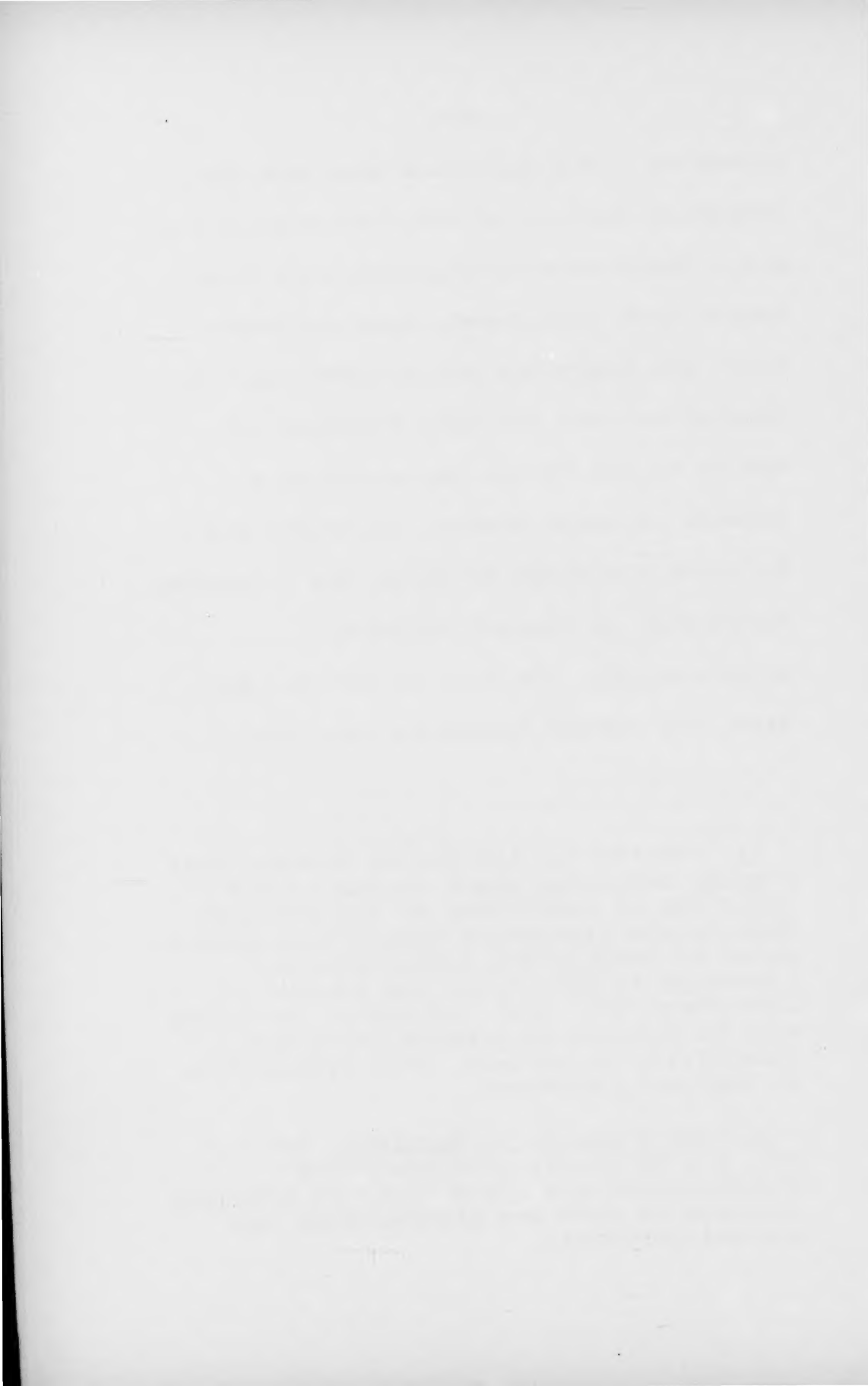
directive. The qualities that are the redeeming feature of codified regulations, e.g., their objectivity—and that they result from considered, open deliberation—are therefore not present. 33/ A regulation that subjects freedoms of speech to the "prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional".

Shuttlesworth, 394 U.S. at 150-51. 34/

Here, the record indicates that the

33/ Remarkably, the police suggest that greater deference might be due to the decisions of individual police officers than to administrative regulations promulgated by legislative authorization. (Petition at 25) Given the greater likelihood that such individual decisions will be colored by personal bias and sensitivity to content, this proposition is logically reversed.

34/ See Niemotko v. Maryland, 340 U.S. 268, 271-72 (1965) (non-statutory undefined official "practice" in granting licenses to park was standardless and unconstitutional).



decision-making process as set forth by Petitioner has extended far beyond definable parameters, and is essentially an open-ended inquiry by a police officer on whether the political and social climate in New York City can tolerate a speaker's views. 35/ Petitioners' request to wield this type of unilateral power cannot merit serious consideration.

C. The Regulation At Issue Does Not Further a Significant Government Interest.

Once it is acknowledged that the courts do have a role in protecting rights of expression from potential police suppression, analysis of the rest of this case falls quickly into place. The only significant government interest alleged by the police in defense of their action is

35/ A107-09, A112, A114-15, A118-23.
See supra pp. 40-41.



the protection of public order and the prevention of violence. Respondents of course do not dispute that, in the abstract, these are significant government interests. The question presented in this case, however, is whether those abstract interests are, in actuality, threatened or even seriously implicated by Dignity's presence on the Sidewalk. In findings based heavily on the credibility of the witnesses present at trial, the district court found that they were not.

In its Petition, the Police Department does not even attempt to present a coherent theory on why the danger of violence would be increased significantly by Dignity's presence on the Sidewalk. 36/

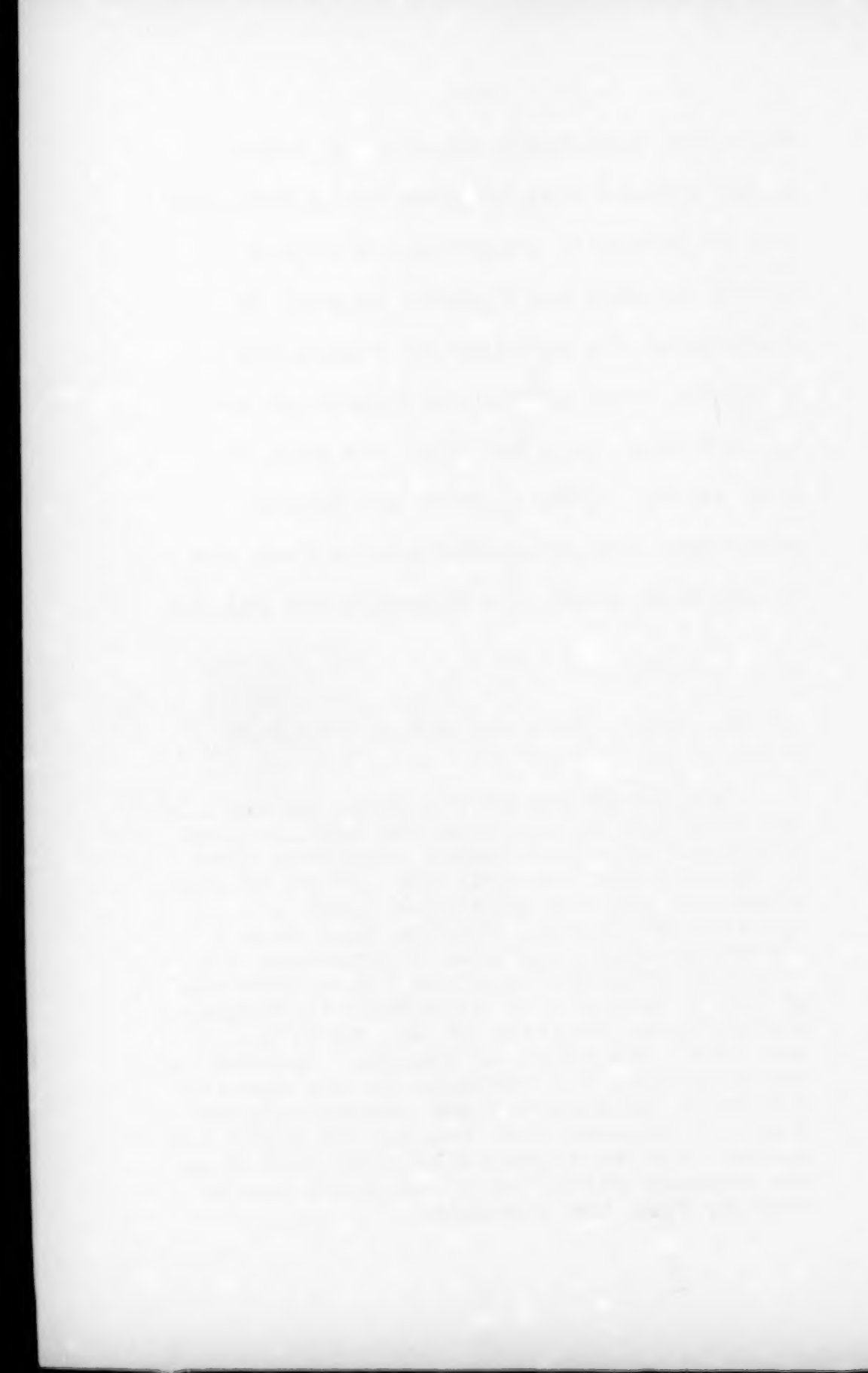
36/ Rather than citing any factual support for its contentions, Petitioners instead rely on comments made by the Second Circuit regarding the potential for violence should Dignity and the anti-gay groups share the Sidewalk simultaneously.



While the Department apparently takes great offense that someone would challenge its "expertise", it now makes little effort to cite any factual support for sustaining its decision to freeze the Sidewalk, even if one were inclined to believe that this decision was made in good faith. Indeed, even the Police Department now belatedly admits that the decision to close the Sidewalk was perhaps

CA2 Op: A18. This was not an issue at trial.

The propriety of the court of appeals reaching out to consider the hypothetical situation of simultaneous demonstrations by Dignity and the anti-gay groups on the Sidewalk, and the appellate court's spontaneous factual finding that such a situation would engender a potential for violence (thereby requiring alternate use of the Sidewalk), is discussed in Respondents' Cross-Petition at No. 86-1177. At any rate, the court of appeals' opinion on the potential for violence in the special situation of simultaneous demonstrations does not suggest that the police could not prevent violence generally, and thus does not support Petitioners' complete ban of Dignity from the Sidewalk.

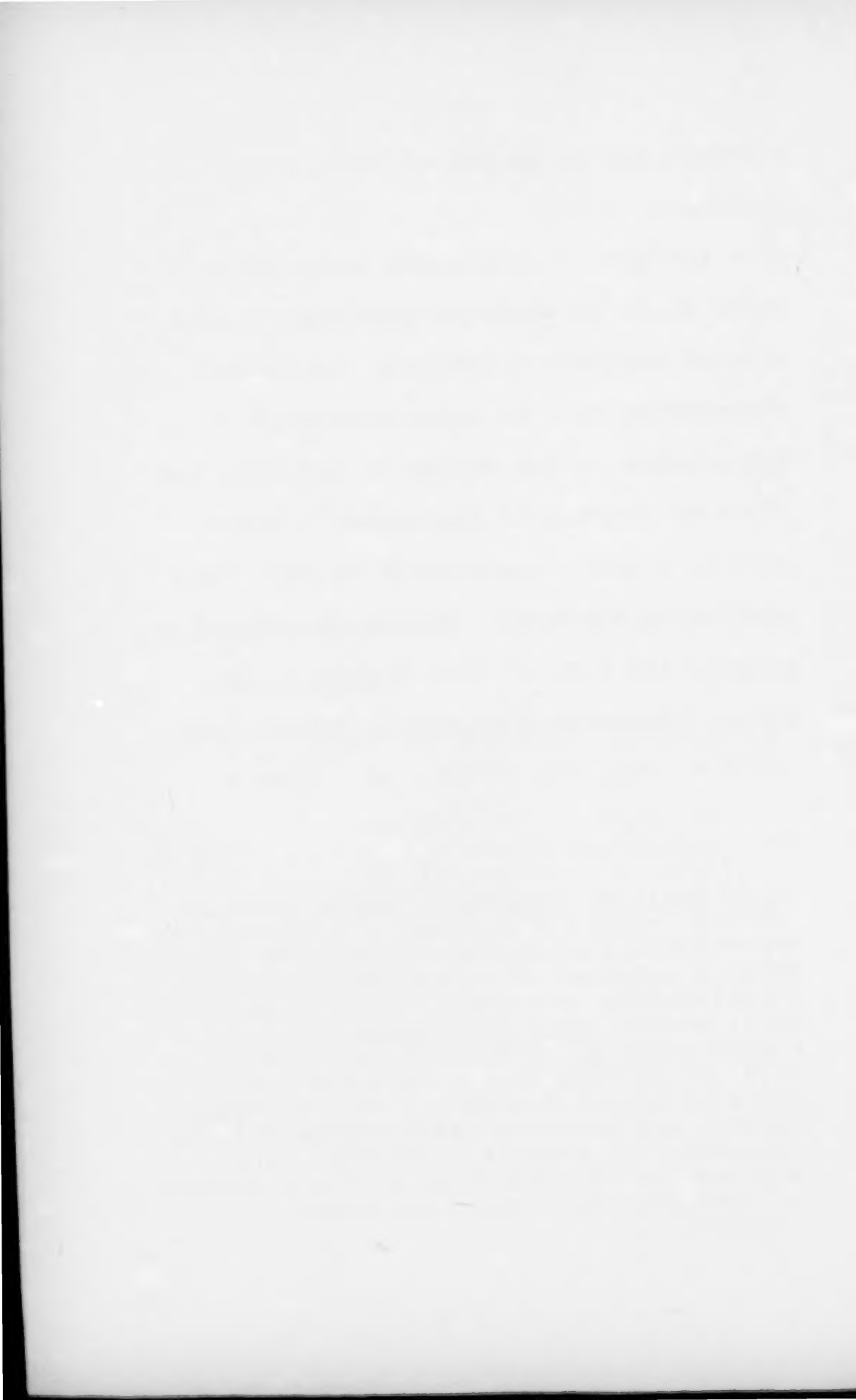


a result of "an excess of caution".

(Petition at 32)

For public safety and order to be a valid basis on which to predicate regulation of expressive activity, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"; there must be a significant basis in fact for predicting disorder. Police Department v. Mosley, 408 U.S. at 101; Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508 (1969). 37/ That a

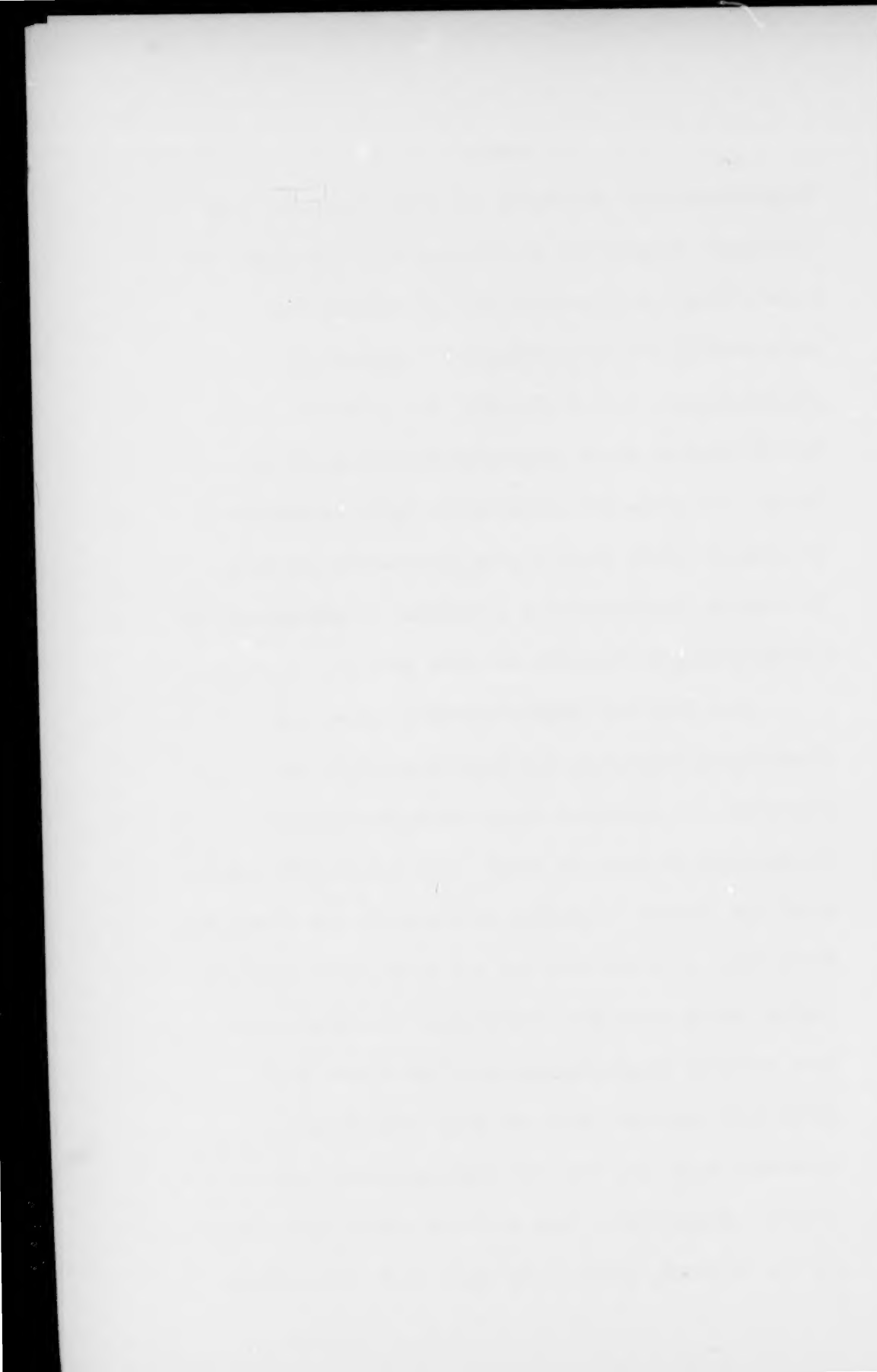
37/ See also Edwards v. South Carolina, 372 U.S. at 231 (dispersal of civil rights demonstration at statehouse not justified despite presence of recognized possible troublemakers in orderly crowd of onlookers); Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1481 1514 (1970) (the threat of a hostile audience almost "certainly will be exaggerated", and may never materialize "if the municipality makes it clear that it will support the demonstrators in their attempt to exercise their first amendment rights").



"hypothetical coterie of the violent and lawless" might be sufficiently annoyed to retaliate is clearly not a basis for censorship of expression. Cohen v. California, 403 U.S. 15, 23 (1971).

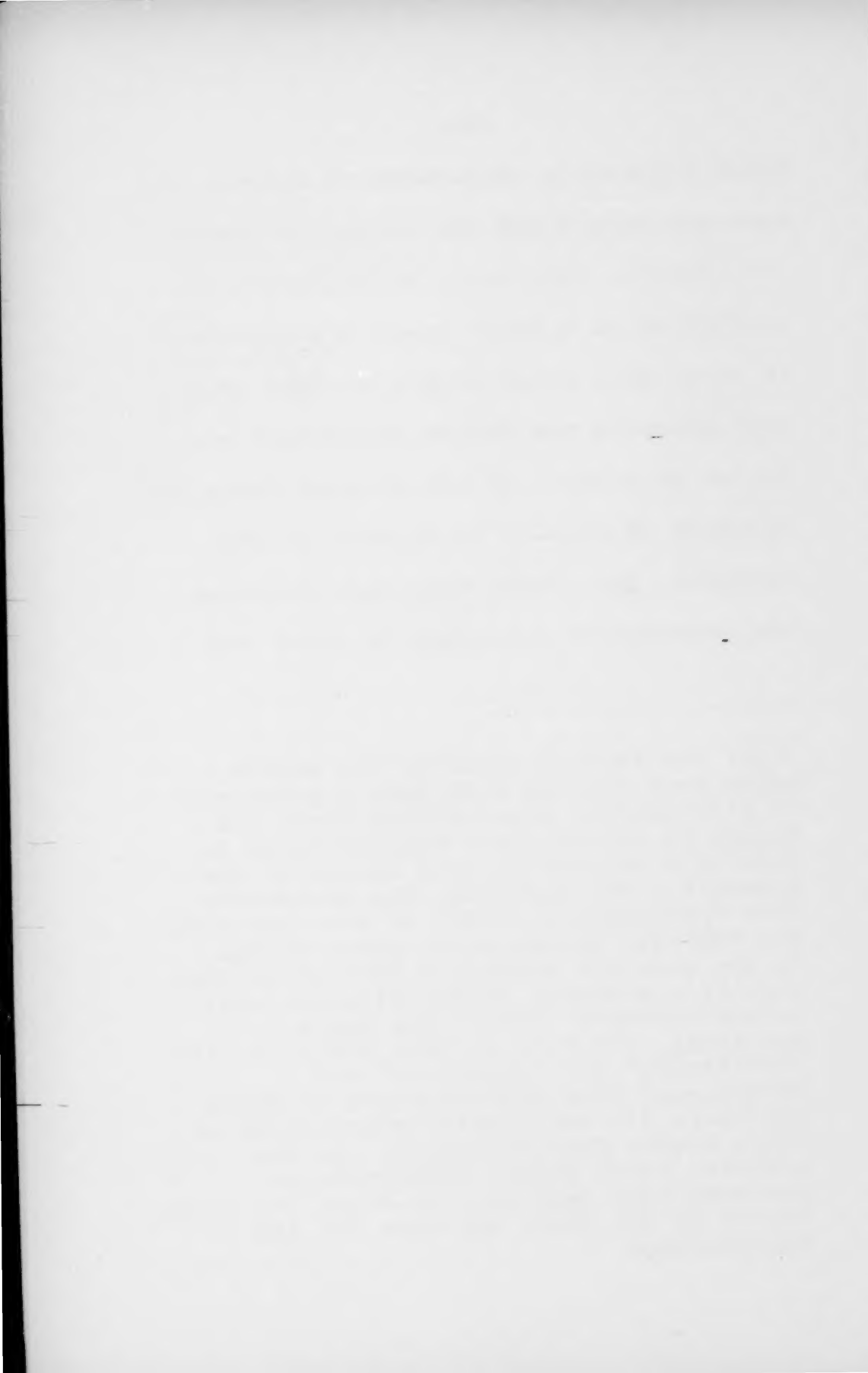
Petitioners were therefore required at least to present objective and credible evidence that Dignity's presence on the Sidewalk presented a serious likelihood of triggering a breach of the peace.

The Police Department's case is therefore reduced to the question of whether it adduced such overwhelming objective evidence that the district court must be found clearly erroneous in finding that the protestations of possible violence were neither credible nor rational. The Police Department admits that the anti-gay groups are on the whole non-violent and intend to demonstrate peacefully. Moreover, the police have specifically stated that they are not concerned



about a possible confrontation between the anti-gay groups and the Parade marchers (Tr. 353-54, 361, 367), which rebuts any prediction of a large scale disturbance. It is at this point simply unclear upon what evidence the Police Department now relies in support of its alleged fears for violence if Dignity is allowed on the Sidewalk. 38/ Thus, this case presents the commonplace situation in which one

38/ The factors cited to the courts below were for the most part a potpourri of disconnected observations about the Parade in general that are unrelated to Dignity's request to have access to the Sidewalk. For instance, the contention that "provocative words" or gestures from the anti-gay groups might occur at the Parade does not support a conclusion that Dignity's presence on the Sidewalk will induce violence (A98). See Cox v. Louisiana, 379 U.S. at 543, 548 n.12, 550 ("muttering" and "grumbling" and "rumblings" from hostile crowd of white onlookers did not justify suppression of civil rights demonstration). As the district court noted, such words or gestures have been part of every Gay Pride Parade in the past, and have not led to any violence.



party has failed to carry its burden of proof.

The Petition does not address in a substantive manner whether its challenged restriction satisfies the next prong of the time, place or manner test, i.e. whether it is narrowly tailored to meet whatever significant governmental interest is shown, other than to conclude that anything other than banning Dignity from the Sidewalk amounts to "fine tuning". 39/

39/ In a sense, Petitioners leap frog to the last prong of the time, place or manner tests, i.e. whether there were ample and effective alternative modes of communication. They then refer to a "wreath laying" ceremony that occurred in 1984 and 1985. Under this scheme, the Parade was halted while Dignity members watched two of their number go onto the Sidewalk for no more than one minute in order to place a wreath. Of course, since the Parade was halted, the other marchers in the Parade, i.e. Dignity's intended audience, did not see the ceremony. As the district court noted in 1985, this ceremony, at which only Dignity members would be present, amounted to "preaching to the converted". (A240)

As the district court noted, whether the regulation is narrowly tailored logically depends on the relative significance of the threat to the asserted government concern. (A156-57) Here, it found the threat to be speculative and minimal, and concluded that the corresponding regulation, which totally barred Dignity from the Sidewalk and thus also totally barred its symbolic message, was "too severe" to qualify as "narrowly" tailored, especially when taken in the face of a plethora of more logical choices, beginning with tighter control on the anti-gay groups, who are, after all, the alleged source of the potential for violence.



CONCLUSION

Petitioners essentially base their argument on the premise that "the federal judiciary should not interfere with reasonable time, place and manner restrictions grounded in good-faith police judgments" (Petition at 20; emphasis added) Respondents agree. 40/ However, the record here demonstrates, and the trial court found, that the restrictions imposed were neither "reasonable" nor in "good faith".

While the facts of this case are curious, and perhaps even disturbing, the application of law presents nothing that this Court has not repeatedly announced as

40/ By "good faith", Respondents assume Petitioners refer to objective good faith and reasonableness. The subjective good faith, or "pure heart", of individual police officers, however, cannot make constitutional an otherwise unconstitutional restriction.



well-travelled ground. The petition for writ of certiorari should be denied.

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Respectfully submitted,

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